Office-Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

Case No. 82-394

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MARY BELLASSAI, et al.,
Petitioners-Plaintiffs

-v-

JAMES McAVOY, et al.,
Respondents-Defendants

CONNIE JEAN McQUAY, et al.,
Petitioners-Plaintiffs

-v-

JAMES McAVOY, et al.,
Respondents-Defendants

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LARRY L. INSCORE
Inscore, Rinehardt & Whitney
3 North Main Street
Mansfield, Ohio 44902
Telephone: (419) 522-2733
Counsel of Record for all Petitioners

and

James DeWeese
Same address and telephone
Co-Counsel for Petitioners

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of a State legislature on a public health issue is a nonjusticiable political controversy immune from judicial review for violation of Constitutional rights?

2. Whether a State can require a substance which produces death, disabling illness and genetic damage to be added to the public water supply without depriving users of that water of life, liberty or property without due process of law when the sole justification for the State's acts is an alleged reduction in tooth decay?

3. Whether the truth of the allegations of the complaint can be challenged in a dismissal solely on the pleadings pursuant to Fed. R. Civ. P. 12 (b) (1) and (6)?

PARTIES TO THE PROCEEDING BELOW

The following persons hereby petition the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit:

Plaintiffs-appellants in Sixth Circuit case no. 81-3371:

Mary Bellassai, Joseph Bellassai, Lilly Avellino, Rita Burt, Edith B. Falcone, Joseph Falcone, Vincent J. Falcone, Robert Juengel, Connie M. Leonard, Donald A. Myers, Jan Myers, Mildred G. Needels, R.T. Needels, Beatrice Paradis, Kim E. Paradis, Marcel Paradis, Scott Paradis, Mickey Phillips, June Pierson, Terry Rinehart, Woodrow Santee, Royce D. Smart, Karola Teagle, and David Wolfe.

Plaintiffs-appellants in Sixth Circuit case no. 81-3372:

Connie Jean McQuay, Mary Archer, Amy M. Arnold, Josephine Aronica, M.D., Eunabelle B. Blackwood, Ph.D., John B. Bender, Marian Bensinger, Audrey J. Bingham, Kathleen Cianchetti, Hilda L. Conner, Merlin Correll, Laurie Davis, Renee M. Gardner, Sharon Hammond, Irene S. Harrison, Virginia K. Hodges, Robert J. Hrovat, Ida Ingram, Mark Ingram, Margaret Kanfire, Rhea Kats, Kathryn Lawrence, Walter Lawrence, Constance Letta, Blanche May, Chlora McGough, Kenneth E. Meadows, John L. Peffer, Sally Platner, Mary A. Prete, Cynthia Smith, Mildred J. Snyder, Katherine Sommer, Karen Taquino, and Eleanor Warner.

The above petitioners file a single petition for both cases pursuant to Supreme Court Rule 19.4 because the cases involve identical questions of law.

The remaining parties to the proceeding below were James McAvoy (Director of the Ohio Environmental Protection Agency) and William J. Brown (the Ohio Attorney General) who were defendants-appellees in both cases,

Robert Quirk (Mayor of Cuyahoga Falls, Ohio) and Larry Valentine (Director of the Cuyahoga Falls Water Utilities Department) who were defendants-appellees in Sixth Circuit case no. 81-3371, and Roy Ray (Mayor of Akron, Ohio) and David Crandell (Water Distribution Manager of the Akron Water Department) who were defendants-appellees in Sixth Circuit case no. 81-3372.

TABLE OF CONTENTS

Questions Presented for Review i
Parties to the Proceeding Below ii
Table of Contents iv
Table of Authorities v
Grounds on Which Jurisdiction is Invoked vii
Relevant Constitutional and Statutory Provisions:
United States Constitution, 14th Amendment, Section 1 vii
28 U. S. C. § 1343 (3) vii
28 U. S. C. § 2201 viii
28 U. S. C. § 2202 viii
28 U. S. C. § 1983 ix
Statement of the Case 1
Argument in Support of Allowing the Writ 5
Proof of Service 20
Appendix A-21
Sixth Circuit's May 24, 1982 order affirming district court A-21
Northern District of Ohio's June 1, 1981 memorandum of opinion and order in Cuyahoga Falls case A-24
Northern District of Ohio's June 1, 1981 memorandum of opinion and order in Akron case A-32
Sixth Circuit's July 7, 1982 order denying petition for rehearing A-34
Ohio Revised Code sections 6109.11, 6109.14, 6109.15, 6109.16, 6109.20, 6109.31, 6109.32 and 6109.33 ..... A-36
Complaint in the Akron case A-40
Complaint in the Cuyahoga Falls case A-46
Affidavit in support of temporary restraining order A-52

TABLE OF AUTHORITIES

CASES PAGE:

Aitkenhead v. *West View Water Authority*, (Allegheny Co., Penna. Ct. of Common Pleas Case No. GD-4585-78 Nov. 16, 1978).....15

Baker v. *Carr*, 369 U. S. 186 (1962) 12,15

Cincinnati ex. rel Crotty v. *Cincinnati*, 50 Ohio St. 2d 27; 361 N.E. 2d 1340 (1977) 7,16

City of Canton v. *Whitman*, 44 Ohio St. 2d 62 (1975).....16

Federal Employees for Nonsmokers' Rights v. *United States*, 466 F. Supp. 181 (D.D.C. 1978) 9

Hospital Building Company v. *Trustees of Rex Hospital*, 425 U. S. 738 (1976).....5,14,17

Illinois Pure Water Committee v. *Yoder*, 268 N.E. 2d 155 (Ill. Ct. App. 1972).....7

Illinois Pure Water Comm., Inc. v. *Yoder*, (Madison Co., Ill. Cir. Ct. Case No. 68-E-128 Feb. 24, 1982. 15

Inez v. *City of East Cleveland*, 431 U.S. 494 (1977) (quoting Justice Harlan's opinion in *Poe* v. *Ullman*) 8

Ingraham v. *Wright*, 430 U.S. 651 (1977) 6

Jacobson v. *Massachusetts*, 197 U.S. 11 (1905)..... 5,10,11,13,16,17

Jenkins v. *McKeithen*, 395 U.S. 411 (1969)..... 5,14,17

Kraus v. *City of Cleveland*, 163 Ohio St. 559 (1955).....16

Meyer v. *Nebraska*, 262 U. S. 390 (1923) 6

Minnesota State Board of Health v. *City of Brainard*, 241 N.W. 2d 624 (1976).....12

Mitchum v. *Foster*, 407 U.S. 225 (1972).....12

Mortensen v. *First Federal Savings and Loan Association*, 549 F. 2d 884 (3rd Cir. (1977) 6,14
Paduano v. *City of New York*, 45 Misc. 2d 718, 257 N.Y.S. 2d 531 (1965).....12

United States Constitution, 14th Amendment, section 1 1,8

STATUTES:

Ohio Revised Code chapter 6109 5
Ohio Revised Code section 6109.20 1,5
Ohio Revised Code section 6111.13 1
28 United States Code section 1343(3)..... .3,6
28 United States Code section 2201 3
28 United States Code section 2202 3
42 United States Code section 1983 1,3,5,6,12

OTHER AUTHORITIES:

Federal Rule of Civil Procedure 12 (b) (1) 3,6,13
Federal Rule of Civil Procedure 12 (b) (6) 3,6,13

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Sixth Circuit which is sought to be reviewed was entered on May 24, 1982. A petition for rehearing was timely filed with that court on June 3, 1982, and that motion was denied in an order entered July 7, 1982. Chapter 28 United States Code section 1254(1) confers jurisdiction on the Supreme Court of the United States to review the judgment of the Sixth Circuit Court of Appeals by writ of certiorari.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution, Section 1, provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. §1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. §2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USC §7428], any court of the United States, upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. §2202:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO REVISED CODE

Ohio Revised Code sections 6109.11, 6109.14, 6109.15, 6109.16, 6109.20, 6109.31, 6109.32 and 6109.33 are set out in the appendix at pages 36 to 39.

STATEMENT OF THE CASE

These cases are civil rights complaints (42 U.S.C. § 1983) by the users of the public water supply in Cuyahoga Falls, Ohio (Sixth Circuit Appeal no. 81-3371) and Akron, Ohio (Sixth Circuit Appeal no. 81-3372) against defendant state and city officials for causing plaintiffs to be deprived, under color of Ohio's mandatory fluoridation statute, of their life, liberty and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. These claims are based on the facts that fluoridation of public water supplies at the levels required by Ohio law produces death and illness in certain very concrete ways described in the complaints.

Ohio's statute requiring statewide fluoridation became effective on November 17, 1969 as Ohio Revised Code section 6111.13. That statute required all public water supplies in the state serving 5,000 or more persons to fluoridate their water supplies within a specified time unless the persons served by that water supply filed a referendum petition within 120 days of November 17, 1969 and voted not to have their water supply fluoridated. It is currently codified, in the Ohio Revised Code section 6109.20 (App. 38). Ohio law requires a level of fluoride in the water of 0.8 to 1.3 parts per million, or approximately 1 milligram fluoride per liter of water.

Akron's water supply has been fluoridated continuously since January 29, 1969 (response to plaintiffs' interrogatory 12 to defendants Ray and Crandell). Cuyahoga Falls has not yet fluoridated its water supply but is under order by the Ohio Director of Environmental Protection to add fluoride to its water. Cuyahoga Falls had previously challenged the application of the fluoridation requirement to it because its citizens had rejected fluoridation in a referendum held November 4, 1969. Its argument was rejected.

The principal difference between the two cases is, therefore, that fluoride has already been put in Akron's water supply, but the order that Cuyahoga Falls put fluoride in its water supply has not yet been executed.

During this period of fluoridation, substantial evidence has been accumulating from scientific research and clinical studies that fluoride at the concentrations required by Ohio to be added to its public water supplies produces multiple threats to human health: Fluoride causes genetic damage. It produces disabling toxic effects from chronic long-term exposure. It produces extraordinary damage to people, like some of the plaintiffs, who have certain other health problems like diabetes, arthritis and kidney disease. Hypersensitive individuals have additional allergic and intolerant reactions to ingesting fluoride. Fluoride has also produced acute poisoning and death in the inevitable malfunction of the fluoridation equipment which has occurred.

Finally, there is telling evidence from both clinical and epidemiological studies that fluoride is a carcinogen. A 1977 double-blind study of the ten largest fluoridated and ten largest non-fluoridated cities in the United States (20 million people over 30 years) determined that fluoride has produced a 5% higher cancer death rate in fluoridated than in non-fluoridated areas and that persons over age 45 were most at risk to the fluoridation-induced cancer. Several of the plaintiffs are in this age group.

Both cases were filed on March 17, 1980, in the United States District Court for the Northern District of Ohio, Eastern Division, and assigned to Judge Manos. In the Cuyahoga Falls case (Sixth Circuit no. 81-3371), plaintiffs also filed a motion for a temporary restraining order against enforcement of the Ohio Director of Environmental Protection Agency's fluoridation order there. Defendants informally agreed to a stay of enforcement while the district

court determined jurisdiction.

The defendants are the Director of the Ohio Environmental Protection Agency, the Ohio Attorney General and the mayors and water department directors of Akron and Cuyahoga Falls, all of whom have enforcement functions under Ohio's fluoridation law. The complaints ask for injunctive and declaratory relief.

Plaintiffs' complaints state a cause of action under 42 U. S.C. § 1983 (see p. ix, *supra*), and the district court accordingly had subject matter jurisdiction under 28 U.S.C. § 1343(3) (see p. vii *supra*). Plaintiffs also contend that the district court had jurisdiction under 28 U.S.C. § 2201 (see p.viii, *supra*) and the power under 28 U.S.C. § 2202 (see p. viii, *supra*) to grant the declaratory judgment and accompanying injunctive relief requested by plaintiffs.

The parties engaged in discovery but no hearings were held in either case.

The Ohio Attorney General and the Director of the Ohio EPA filed an answer raising the defenses of lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Shortly thereafter, they filed a motion to dismiss on these grounds pursuant to Federal Rule of Civil Procedure 12 (b)(1) and (6). On June 1, 1981, Judge Manos dismissed both suits for "lack of jurisdiction. Fed. R. Civ. P. 12 (b)(1) and (6)" based on the reasoning and authority in his memorandum opinion. (App. 24) Defendants' motion to dismiss was not supported by affidavits or other evidentiary matter, and the court did not mention consideration of any such matter in the opinion accompanying its June 1, 1981 orders. No hearing was held on this motion to dismiss.

Plaintiffs filed their joint notices of appeal to the United States Court of Appeals for the Sixth Circuit from this ruling on June 19, 1981. The Sixth Circuit consoli-

dated the two cases for hearing and affirmed the district court in an order filed May 24, 1982. Plaintiffs-petitioners filed a petition for rehearing on June 3, 1982 which was denied by the Sixth Circuit in an order filed July 7, 1982. Petitioners now file the present petition for writ of certiorari with this Court.

ARGUMENT IN SUPPORT OF ALLOWING THE WRIT

The Sixth Circuit Court of Appeals in its May 24, 1982 order in these cases decided two federal questions in conflict with the applicable decisions of this Court:

1. Its holding that a challenge to a public health measure adopted by a legislature presents a non-justiciable political controversy is in direct conflict with *Jacobson v. Massachusetts*, 197 U. S. 11 (1905).

2. Its holding that the allegations of the complaint need not be accepted as true in considering a dismissal on the pleadings is in direct conflict with decisions of this Court including, for example, *Hospital Building Company v. Trustees of Rex Hospital*, 425 U. S. 738, 740 (1976) and *Jenkins v. McKeithen*, 395 U. S. 411, 421-422 (1969).

In the following argument, petitioners briefly explain the nature of the issues raised by their complaints and then point out the conflict between the Sixth Circuit's holdings and the applicable decisions of this Court on each of the two points specified above.

A. Introduction to Petitioners' Claims.

These two cases are challenges under 42 U.S.C. § 1983 to Ohio's mandatory statewide flouridation law (O.R.C. § 6109.20 and chapter 6109) on the basis that fluoridation at the 1 part per million concentration required to be placed in the public water supply produces cancer and cancer death, genetic damage, chronic and acute toxicity, allergic reactions in hypersensitive individuals and extraordinary damage to persons with certain existing health problems which are common in our society like

arthritis, kidney ailments and diabetes. Plaintiffs-appellants therefore contend that requiring fluoride to be added to their water under color of Ohio law deprives them of life, liberty and property without due process of law. No federal court has previously considered this question, although state courts have found such a cause of action.

Both of the cases at bar were dismissed at the pleading stage for lack of federal subject matter jurisdiction (Fed. R. Civ. P. 12 (b)(1)) and for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12 (b)(6)). No affidavits or other sworn material was submitted in support of the motion to dismiss nor mentioned by the District Court in its decision. Consequently, the question for purposes of review is, assuming the factual allegations of the complaints to be true, do the complaints state a claim for which there is federal subject matter jurisdiction and one upon which relief can be granted? *Mortensen* v. *First Federal Savings cnd Loan Association*, 549 F. 2d 884, 891 (3d Cir. 1977).

If the complaints describe the deprivation under color of state law of rights protected by the United States Constitution, then there is both federal subject matter jurisdiction (28 U. S. C. § 1343 (3)) and a claim upon which relief can be granted (42 U. S. C. § 1983).

Plaintiffs contend that defendants' acts pursuant to Ohio law deprive them of life, liberty and property without due process of law. Fluoride produces cancer death. It thereby deprives the users of the public water supply of life without due process of law. Fluoride produces serious disabling illness and genetic defects. It thereby deprives the water users of a protected liberty interest in freedom from unreasonable intrusions on personal security (*See, e.g., Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977)), and in the lawful enjoyment of all one's faculties and of the activities of ordinary life (*See, e.g., Meyer* v. *Nebraska*,

262 U. S. 390, 399 (1923)).

Plaintiffs' single constitutional claim is that the concrete harm produced by fluoridation is what works the Constitutional violation. They do not make the abstract arguments of deprivation of freedom of choice, free exercise of religion, and the like which have been raised in past constitutional challenges to fluoridation.

Courts which have considered claims like those raised by plaintiffs have agreed that the claims do state a Constitutional deprivation. *Cincinnati ex. rel Crotty* v. *Cincinnati*, 50 Ohio St. 2d 27, 29; 361 N.E. 2d 1340, 1341 (1977); *Illinois Pure Water Committee* v. *Yoder*, 286 N.E. 2d 155, 157 (Ill. Ct. App. 1972) (plaintiffs alleged fluoridation placed their lives and health in jeopardy without due process of law; appeals court found they stated a cause of action, reversing the trial court). In *Crotty*, the Ohio Supreme Court stated in dicta:

> A more difficult question is raised by the claim that fluoride is a carcinogen based on statistics that the cancer death rate has increased in certain cities with fluoridated water while remaining the same in certain other cities which did not fluoridate. The evidence for this claim has not been tested by litigation and is disputed by other authorities. If scientifically proved, these claims could raise legitimate questions as to the constitutionality of fluoridation as a public health measure, and, since these claims are based upon very recent studies, the purposes underlying the principle of res judicata would probably not be served by barring litigation to determine the validity of the claims.

50 Ohio St. at 29, 361 N.E. 2d at 1341.

The principle method of review under the due process clause of the 14th Amendment is interest balancing. The protected individual interest is balanced against the state interest promoted by the legislation.

> [T]hrough the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for liberty of the individual, has struck between that liberty and the demands of organized society.

Inez v. *City of East Cleveland*, 431 U. S. 494, 501 (1977) (quoting Justice Harlan's opinion in *Poe* v. *Ullman*). Consequently, there are just 2 questions to answer to resolve plaintiffs' due process challenge here: Do the complaints state a Constitutional claim, and if so, does the state's interest outweigh any violation of Constitutional rights which is described?

Applying the questions to the facts in these cases:

1. Can the state add a poison to the water supply without violating the water users' Constitutional rights?

And if the first question is answered negatively:

2. Is the state's interest in the alleged reduction of a noncontagious, nonfatal dental condition so overwhelming that it justifies the death, genetic damage and serious disabling illness produced by fluoridation?

Only if 1 of these two questions can be answered affirmatively can the district court be sustained in its dismissal of these cases on the pleadings. The Sixth Circuit sustained that dismissal, however, based on two conclusions:

a. The decision of the state legislature to fluoridate is a non-justiciable political controversy,

and

b. The allegations of the complaint cannot be proved.

Both conclusions conflict with the holdings of the Supreme Court.

B. The Sixth Circuit's conclusion that fluoridation is a nonjusticiable political controversy is in direct conflict with *Jacobson* v. *Massachusetts* and the decisions of other courts.

In affirming the district court, the Sixth Circuit set out its reasoning in a single paragraph which is five sentences long. The final three sentences of that paragraph are:

> The fluoridation issue has been presented to the Ohio Legislature and Ohio Revised Code §6109 *et seq.* is the result of the exercise of its legislative judgment. We agree with the district court that the resolution of the fluoridation issue must be left to the legislative process. *See, e.g, Federal Employees for Nonsmokers' Rights* v. *United States*, 466 F. Supp. 181, 185 (D.D.C. 1978). We find the issue at hand to be a nonjusticiable political controversy.

Sixth Circuit's May 24, 1982 order at 3 (App. 23).

The Sixth Circuit's position is that regardless of the harm caused by fluoridation, there is no Constitutional protection for water users because fluoridation is a political decision relegated to the legislature. Plaintiffs have discovered no other case which takes this surprising position.[1]

---

[1] *Federal Employees for Nonsmokers' Rights* v. *United States* cited by the Sixth Circuit, certainly does not take that position. It does not deal with any exercise of the state's police power. That case rejected an argument that the federal government was Constitutionally compelled to prevent third persons from smoking in government buildings. It was the acts of third persons and not government actions which produced plaintiffs' problems there.

This position is in direct conflict with the United States Supreme Court's decision in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905).

In *Jacobson*, the Supreme Court considered a Constitutional challenge to a much weightier public health measure — compulsory vaccination against smallpox when a smallpox epidemic threatened. In upholding that law, the Court expressly recognized that constitutional challenges to public health or police power measures do present justiciable controversies:

> [N]o rule prescribed by a state, nor any regulation adopted by a local government agency action under the sanction of state legislation, shall contravene the Constitution of the United States nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict . . . with any right which [the Constitution] gives or secures.

197 U.S. at 25.

The Court based its decision in *Jacobson* on a balancing of the infringement of individual rights against the public interest served by the law:

> Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which

---

[1]continued

Because the Constitution generally provides no protection from the acts of private individuals, the plaintiffs had to look to the legislature to balance the competing individual claims for protection. 446 F. Supp. at 185.

> threatens the safety of its members. . . . [T]he rights of the individual in respect to his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations as the safety of the general public may demand.

197 U. S. at 27-29.

To be absolutely sure its position was not misinterpreted, the Supreme Court concluded the *Jacobson* opinion by again stating that the controversy was justiciable and that the courts would provide relief in appropriate circumstances :

> Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe — perhaps to repeat a thought already sufficiently expressed, namely — that the police power of a state, whether exercised directly by the legislature or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

197 U. S. at 38. The Sixth Circuit's holding in the present case that the police power decision to fluoridate is a nonjusticiable political question is therefore in direct conflict with the Supreme Court's holding in *Jacobson*.

Similarly, the Sixth Circuit's decision in this case conflicts with the opinions of various state courts which have rejected past Constitutional challenges to fluoridation. In those decisions which do discuss harm, the courts hold

only that so long as the evidence of harm is unconvincing, the legislature's decision to fluoridate would not be disturbed. *See, e.g., Minnesota State Board of Health* v. *City of Brainard*, 241 N.W. 2d 624, 632 (1976) ("While forced fluoridation does, to a limited extent, infringe upon an individual's freedom to decide whether he will or will not ingest fluoride, such an infringement, absent any significant adverse consequences to the individual, cannot be accorded substantial weight."); *Paduano* v. *City of New York*, 45 Misc. 2d 718, 257 N.Y.S. 2d 531, 542 (1965) ("Executive and legislative branches of government [have the right to impose compulsory fluoridation] at least until some proof is adduced that fluoridation has harmful side effects and therefore is not in the interest of the community.") Not one of these cases takes the position that fluoridation is Constitutional regardless of the harm it causes.

Nonjustiacible political questions are those which are committed by the Constitution to another branch of government. *Baker* v. *Carr*, 369 U.S. 186, 210 - 211 (1962). A legislature making a police power decision is free to do as it thinks best until it impermissibly violates the Constitutional rights of United States citizens. Congress has instructed the United States Courts to protect the rights of the complaining citizen in those circumstances:

> The very purpose of § 1983 was to interpose the federal courts between the States and the people as guardians of the people's rights — to protect the people from unconstitutional actions under color of state law, "whether that action be executive, legislative or judicial."

Mitchum v. *Foster*, 407 U.S. 225, 242 (1972). In *Baker* v. *Carr*, not even the legislature's decision drawing its own

constituent districts was found to be a political question immune from Court review.

The decision to fluoridate is no more nonjusticiable than any other police power determination. *Jacobson* holds that public health measures are justiciable. Consequently, the question is whether the harm described in the complaints states a deprivation of Constitutionally protected rights. The Sixth Circuit bypassed this question in its order by refusing to accept the allegations of the complaint.

C. The Sixth Circuit's refusal to accept the allegations of the complaint as true for reviewing a dismissal on the pleadings conflicts with the decisions of this Court.

The Sixth Circuit concludes, without there having been any examination of the evidence, that the evidence of fluoride's harm is inconclusive:

> Appellants seek to present scientific evidence to support their claims that fluoridation creates a serious risk of harm. Scientific evidence, however, also exists which supports the view that fluoridation does not create a serious risk of harm to the public.

Sixth Circuit's May 24, 1982 order at 3 (App. 23).

In so holding, the panel bypasses the allegations of the complaint in conflict with the Supreme Court's procedure for review of a dismissal on the pleadings.

In reviewing a dismissal of a complaint on the pleadings pursuant to Fed. R. Civ. P. 12(b)(1) or (6), the Court must examine the allegations of the complaint to determine whether they state a claim and whether there is federal jurisdiction. For this purpose, the allegations of the

complaint are accepted as true and inferences favorable to the plaintiffs are drawn from those allegations:

> Since we are reviewing a dismissal on the pleadings, we must, of course, take as true the material facts alleged in [the complaint].

Hospital Building Company v. Trustees of the Rex Hospital, 425 U.S. 738, 740 (1976). *See also, Mortensen v. First Federal Savings & Loan Association*, 549 F. 2d 884, 891 (3rd Cir. 1977).

> For the purpose of a motion to dismiss, the material allegations of the complaint are taken as admitted. *See, e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 US 172, 174-175, 15 L Ed 2d 247, 249, 250, 86 S Ct 347 (1965). And the complaint is to be liberally construed in favor of plaintiff. *See* Fed Rule Civ Proc 8(f); *Conley v. Gibson*, 355 US 41, 2 L Ed 2d 80, 78 S Ct 99 (1957). The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, supra*, at 45-46, 2 L Ed 2d at 84.

Jenkins v. McKeithen, 395 U.S. 411, 421-422 (1969). The Sixth Circuit's conclusion that here—as in nearly every genuine case or controversy—there are two sides to the question, does not mean that every such case or controversy can be dismissed on the pleadings. This is not the appropriate test for dismissal on the pleadings. Only if the complaint's allegations, taken as true, fail to pass muster is it appropriate to dismiss at this stage of the proceedings.

A complaint could conceivably make factual allegations which were so transparently false that the complaint could be challenged on its face. Even in those cases, the appropriate method to dismiss the complaint and still preserve the integrity of the judicial process would be to dismiss after at least a cursory look at the evidence on motion for summary judgment or some other summary proceeding. In *Baker v. Carr*, 369 U.S. 186 (1962), this Court cautioned that a Constitutional claim should not be dismissed on the pleadings unless the claim is "so attenuated and unsubstantial as to be absolutely devoid of merit." *Id.* at 199.

The present complaints plainly have no such infirmity. There is nothing in the pleadings or the record to show they are absolutely devoid of merit.

Not only are there specific citations to scientific research showing the harm of fluoride in the affidavit (App. 52) submitted in support of the application for a temporary restraining order, but there is also the additional assurance that the two state courts which have given extensive hearings since 1978 to portions of this scientific evidence have concluded that the evidence of fluoride's harm was so convincing that it justified an injunction. In *Aitkenhead v. West View Water Authority* (Allegheny Co., Penna. Ct. of Common Pleas Case No. GD-4585-78 Nov. 16, 1978), Judge Flaherty concluded that he was "compellingly convinced of the evidence in favor of plaintiffs." In *Illinois Pure Water Comm., Inc. v. Yoder* (Madison Co., Ill. Cir. Ct. Case No. 68-E-128 Feb. 24, 1982), Judge Niemann concluded that "In view of plaintiffs evidence . . . a risk exists of serious health hazards." and that "A conclusion that fluoride is a safe and effective means of promoting dental health cannot be supported by this record."

Most of this scientific evidence did not even exist at the time the Ohio Legislature made the decision to fluoridate. For example, the large scale epidemiological study of Doctors Burk and Yiamouyiannis of 20 million people over 30 years demonstrating the link between fluoridation and increasing cancer death rates was not published until 1977. The recent origin of this evidence prompted the Ohio Supreme Court—which had twice previously rejected Constitutional challenges to fluoridation in *Kraus v. City of Cleveland*, 163 Ohio St. 559 (1955) and *City of Canton v. Whitman*, 44 Ohio St. 2d 62 (1975)—to conclude that claims like plaintiffs' were not barred by previous litigation concerning fluoridation. (See quote at page 7, *supra*).

This evidence is not speculation or opinion.[3] It is hard, scientific fact accumulated over 20 years, like the fact that fluoride at the concentrations placed in the public water supply inhibits DNA (the body's genetic blueprint material) repair enzyme activity by 50% and the fact that fluoride at the concentration in the blood of a person drinking fluoridated water depresses the body's immune defense mechanism by inhibiting the migration of white blood cells. In issues of scientific fact, unlike issues of politics or art, truth can be determined.

---

[3] In *Jacobson*, in contrast to the present case, the Massachusetts Supreme Court had made at least a cursory examination of the evidence tendered to show the harm of smallpox vaccinations. The Court found however that Jacobson's allegations of harm were each such that "in its nature, . . . it cannot be stated as a truth, otherwise than as a matter of opinion." 197 U.S. at 23 quoting 183 Mass. 242, 66 N.E. 719. None of the allegations concerned the results of scientific research, but rather only the opinions of the plaintiff and of certain medical doctors.

The complaints cannot be dismissed on the pleadings merely because the Court believes, without any adversary examination of the evidence, that the evidence will be inconclusive. If the allegations of the complaint state a cause of action, then the cases should be remanded to give the plaintiffs an opportunity to demonstrate their truth by the appropriate burden of proof in an adversary hearing.

D. Conclusion.

Petitioners respectfully suggest that the Sixth Circuit made two errors of law conflicting with this Court's rulings:

> 1. The conclusion that fluoridation is a non-justiciable political question committed to the legislative branch is directly contrary to the holding of *Jacobson v. Massachusetts* and of other courts considering the fluoridation question.
>
> 2. The conclusion that the complaints may be dismissed because they believe the evidence of fluoride's harm is inconclusive is contrary to the standard of review for a dismissal on the pleadings which is set out in *Hospital Building Co. v. Trustees of Rex Hospital* and *Jenkins v. McKeithen*.

If the allegations of harm in the complaints were taken as true, the complaints would not have been dismissed at the pleading stage. The death, genetic damage, and

serious disabling illness raise the deprivation of life without due process of law and unjustified intrusions on personal security.

To be frank, both the district court and the court of appeals probably dismissed the complaints because they doubt the truth of the allegations. They feel that a substance which has gained such widespread use could not possibly have such harmful properties. The disbelief is fueled by the fact that fluoride's harm is not instantaneous or obvious. The harm produced by chronic, long-term exposure to fluoride includes cancer, genetic damage, and aggravation of existing illnesses. None of these harms advertises itself to the public consciousness as being fluoride-related. It is therefore easy to gain the impression that fluoride is harmless. Nevertheless, the death and harm produced are just as real and final for the victims.

It cannot be true that the state may put a carcinogenic, mutagenic, enzyme-inhibiting poison into the water supply without violating Constitutional rights. The state raises no interest which would justify such an infringement. The real issue raised by these cases is whether the ill effects of fluoride can be demonstrated by competent, scientific evidence. If they cannot, then indeed the matter is an area in which the legislative judgment will hold sway. But there is no way for the Court to make that determination without any adversary examination of plaintiffs' evidence.

The Sixth Circuit holdings that a state legislature's decision on a public health measure is a nonjusticiable political question and that the truth of the pleadings can be questioned in dismissing on the pleadings are contrary to the applicable decisions of this Court. The complaints do state a cause of action upon which relief may be

granted and one for which there is federal jurisdiction. The petition for writ of certiorari should be granted.

Respectfully submitted,

Larry L. Inscore
INSCORE, RINEHARDT AND WHITNEY
3 North Main Street
Mansfield, Ohio 44902
Telephone: (419) 522-2733
Counsel of Record for Petitioners

James DeWeese
Same Address
Co-counsel for Petitioners

PROOF OF SERVICE

I certify that three copies of this petition for writ of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this 3rd day of September, 1982 to E. Dennis Muchnicki, Assistant Attorney General, 30 East Broad St., Columbus, Ohio 43215, Attorney for Defendants McAvoy and Brown; to Carmen V. Roberto, Law Director, 2310 Second St., Cuyahoga Falls, Ohio 44222, Attorney for Defendants Quirk and Valentine; and to Randall A. Cole, Assistant Director of Law, 304 Municipal Building. Akron, Ohio 44308, Attorney for Defendants Ray and Crandell.

_____

Counsel of Record for Petitioner

NOS. 81-3371 and 81-3372

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARY BELLASSAI, ET AL,
Plaintiffs-Appellants,

v.

JAMES McAVOY, ET AL,
Defendants-Appellees.

ORDER

CONNIE JEAN McQUAY, ET AL,
Plaintiffs-Appellants,

v.

JAMES McAVOY, ET AL,
Defendants-Appellees.

Filed May 24, 1982.

Before: BROWN and MARTIN, Circuit Judges; HORTON, District Judge.*

On march 17, 1980, Mary Bellassai and twenty-three other residents of Cuyahoga Falls, Ohio brought an action against James McAvoy, the Ohio Director of Environmental Protection, William J. Brown, Ohio Attorney General, Robert Quirk, Mayor of Cuyahoga

---

* The Honorable Odell Horton, United States District Judge for the Western District of Tennessee, sitting by designation.

Falls, and Larry Valentine, Director of the Cuyahoga Falls Water Utilities Department under 42 U.S.C §1983 and 28 U.S.C. §§1343, 2201, and 2202, seeking an injunction restraining the enforcement or implementation of Ohio Revised Code §6109 *et seq.*, which requires the addition of fluoride to public water supplies. On the same date, Connie Jean McQuay and thirty-three other residents of Akron, Ohio brought a similar action against McAvoy, Brown, Roy Ray, Mayor of Akron, and David Crandell, Akron Water Distribution Manager. The complaints in both cases claimed the Ohio Revised Code §6109 *et seq.* unconstitutionally deprived them of the right of life, liberty or property without due process of law in violation of the Fourteenth Amendment. Specifically, the co. 'aints alleged that fluoridation causes, *inter alia*, increased rates of death from cancer, and thus deprives life without due process of law. The two cases differ factually in that Akron's water supply has been fluoridated since 1969 while Cuyahoga Falls, which is under order by the Ohio Director of Invironmental Protection to fluoridate its water, has not yet done so.

No hearings were held in either case. On June 1, 1981, the district court dismissed both suits for lack of a substantial federal question and for failure to state a claim upon which relief can be granted. FED.R.CIV.P. 12 (b) (1) and (6). For the reasons stated herein, we affirm.

The district court's opinion dismissing the complaints noted that "the public health and safety purposes served by fluoridation of municipal water systems has [sic] been debated in the State of Ohio for over twenty-five years." The district court also expressly declined to follow the dicta of th- Ohio Supreme Court set forth in *City of Cincinnati ex rel. Crotty v. City of Cincinnati*, 361 N.E. 2d 1340, 1341-42 (Ohio 1977), wherein it was observed that claims of cancer caused by fluoridation, if scien-

tifically proven, could raise questions as to the constitutionality of fluoridation. In so doing, the district court stated that it would decline "the opportunity to act as a 'super-legislature'" and would leave "the task of overseeing and protecting public health to the Ohio legislature and their duly appointed experts in the Ohio Environmental Protection Agency."

Appellants seek to present scientific evidence to support their claims that fluoridation creates a serious risk of harm. Scientific evidence, however, also exists which supports the view that fluoridation does not create a serious risk of harm to the public. The fluoridation issue has been presented to the Ohio legislature and Ohio Revised Code §6109 *et seq.* is the result of the exercise of its legislative judgment. We agree with the district court that the resolution of the fluoridation issue must be left to the the legislative process. *See e.g. Federal Employees for Nonsmokers' Rights v. United States*, 466 F.Supp. 181, 185 (D.D.C. 1978). We find the issue at hand to be a non-justiciable politi l controversy.

Accordingly, it is ORDERED that the decision of the district court be and is hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARY BELLASSAI, et al.,
Plaintiffs,

v.

CASE NO.
C80-376A

JAMES F. McAvoy, et al.,
Defendants.

Judge John M. Manos

MEMORANDUM OF OPINION
AND ORDER
Filed June 1, 1981
4:01 P.M.

On March 17, 1980, Mary Bellassai and twenty-three other residents of Cuyahoga Falls, Ohio filed the above-captioned case seeking an order to enjoin fluoridation of the city's public water supply. Pursuant to an agreement reached between the plaintiffs and defendants James McAvoy, Ohio Director of Environmental Protection, William Brown, Attorney General of Ohio, Robert Quirk, Mayor of Cuyahoga Falls, and Larry Valentine, Cuyahoga Falls Director of Utilities, fluoridation was stayed pending the court's determination of jurisdiction.

The complaint alleges that §6109, *et seq.* of the Ohio Revised Code, which mandates fluoridation of public water systems serving more than 5,000 persons, unconstitutionally infringes on the plaintiffs' rights to life, liberty, and health, thereby depriving them of rights secured by the Fourteenth Amendment. 42 U.S.C. §1983. Both

declaratory and injunctive relief is sought, 28 U.S.C. §§2201, 2202; and jurisdiction is based on 28 U.S.C. §1343.

Upon due consideration, the court concludes that the plaintiffs' claim does not present a substantial federal question upon which jurisdiction can be predicated, and dismisses the complaint.

The public health and safety purposes served by fluoridation of municipal water systems has been debated in the State of Ohio for over twenty-five years. *See, Kraus v. City of Cleveland*, 116 N.E.2d 779 (1953); appeal denied for want of a substantial federal question, 351 U.S. 935 (1956). During the period, public stridency over the issue has fluctuated as new scientific data has become available. Throughout, the state legislature has enacted successive statutes in response to public concern over the issue.[1] Presently Section 6109.20 of the Ohio

---

[1] Ohio Revised Code §6111.13 preceded and is the counterpart of Revised Code §6109.20, the statute contested herein. The statute required the fluoridation of public water supplies serving over 5,000 persons before January 1, 1972. Between November 17, 1969, and March 22, 1973 municipalities could submit the issue of fluoridation to a referendum. That enactment, designed to serve the desires of individual municipalities was repealed by the state legislature in 1973. Section 6109.20, which superseded §6111.13, became effective in December 1978.

Although not dispositive of the instant cause of action, it is noteworthy that a Cuyahoga Falls referendum held on November 4, 1969 rejected fluoridation. In 1976 the Director of Environmental Protection sought to enforce §6111.13 and to require Cuyahoga Falls to flouridate its water.

Revised Code requires fluoridation, and provides:

> If the natural fluoride content of supplied water of a public water system is less than eight-tenths milligrams per liter of water, fluoride shall be added to such water to maintain fluoride content of not less than eight-tenths milligrams per liter of water nor more than one and three-tenths milligrams per liter of water beginning:
>
> (A) On or before January 1, 1971, for a public water system supplying water to twenty thousand or more persons;
>
> (B) On or before January 1, 1972, for a public water system supplying water to five thousand or more persons, but less than twenty thousand persons.

This cause of action represents the latest in a series of suits which have assailed fluoridation on state statutory,

---

[1] continued

The Director found that the November 4, 1969 referendum was not held within the statutory period prescribed by §6111.13 and therefore could not be relied upon by Cuyahoga Falls to avoid fluoridation. The Director held administrative hearings on the issue between 1976, and his November 1978 decision and order. That decision was appealed to the Board of Environmental Review and the Appeals Court of Franklin County, both of which upheld the Director. On December 28, 1979, the Supreme Court of Ohio refused to consider the city's appeal.

and federal and state constitutional grounds. *Kraus, supra; Alkire v. Cashman*, 350 F. Supp. 360 (S.D. Ohio 1972), *aff'd.* 477 F. 2d 598, *cert. denied*, 414 U. S. 858 (1973); *City of Canton v. Whitman*, 44 Ohio St. 2d 62, 337 N.E. 2d 766 (1975); *State ex rel Willias v. City of Canton*, 51 Ohio St. 2d 81, 364 N.E. 2d 1161 (1977); *City of Cincinnati ex rel Crotty v. City of Cincinnati*, 50 Ohio St 2d 27, 361 N.E. 2d 1340 (1977).

The plaintiffs represent that recent scientific data links fluoride to increased risk of cancer. Because some studies have labeled fluoride a carcinogen, it is the plaintiffs' contention that the addition of fluoride to the water in Cuyahoga Falls will increase their risk of cancer, thereby denying them life, liberty, and health in violation of the Fourteenth Amendment.

While it is clear that the Fourteenth Amendment prohibits the states from denying citizens the rights of life and liberty without due process of law, and guarantees equal protection, the precise spectrum of rights and liberties encompassed by the Fourteenth Amendment is historically less clear, and the subject of evolving case law and commentary by the Supreme Court.

Although nearly every state statute limits individual rights and liberties, the mere fact of limitation does not constitute a Fourteenth Amendment violation. It is a right of the state, pursuant to its police powers, to control the health and safety of its citizens. *Shapiro v. Thompson*, 394 U.S. 665, 89 S. Ct. 1343 (1969). Determination of whether constitutional rights have been impinged by a state's exercise of its police powers, and the proper balance to be struck between the interests of society and the rights of the individual, is a matter within the purview of the courts. *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923); *Poe v. Ulman*,

367 U.S. 541, 81 S. Ct. 1752 (1961); *Roe v. Wade*, 410 U.S. 155, 93 S. Ct. 705 (1973).

Normally, a state statute which limits individual liberty will be upheld where there is established a rational relationship between the legislative purpose and the efficacy of the statute in accomplishing that purpose. *Meyer, supra; Poe, supra; Weber v. Aetna Casualty and Surety Company*, 406 U.S. 173, 92 S. Ct. 1400 (1972).

> The question is whether the challenged statute is a rational means of advancing a valid state interest. A regulation not reasonably related to a valid government interest may not stand in the face of a due process attack. Likewise, a classification which serves no rational purpose or which arbitrarily divides citizens into different classes and treats them differently violates the equal protection clause.

Thompson v. Gallagher, 489 F. 2d 443, 447 (5th Cir. 1973).

When the statute impinges rights and liberties which are more "fundamental," the courts are constrained to scrutinize the enactment more closely, and absent the showing of a compelling state interest, those fundamental rights will not be infringed.
Roe v. Wade, 410 U.S. 155, 93 S. Ct. 705 (1973); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1332 (1969); *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963); *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954). Further, when fundamental rights are at stake, the legislative enactment will be upheld only if it is drawn as narrowly as possible to express the legitimate interest of the state. *See, e.g.*,

Griswold v. Connecticut, 381 U.S. at 485, 85 S. Ct. at 1682 (1964); *Carey v. Population Services International*, 431 U.S. at 686, 97 S. Ct. at 2017 (1976); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 16-17, 93 S. Ct. at 1287-1288 (1972).

The "right to health," as conceptualized by the plaintiffs, is an absolute, fundamental right of an individual to dominion and control over his or her body. Such conceptualization is contrary to case authority which holds that the right to one's body is not absolute. *Roe v. Wade*, 510 U.S. 155, 93 S. Ct. 705 (1973). *Kraus v. Cleveland*, 116 N.E. 2d 779, *appeal denied*, 351 U.S. 935 (1956). Indeed, the precise claim was raised in *Kraus*, *supra*, wherein the Supreme Court denied an appeal for lack of a substantial federal question.

> It is the contention of the plaintiff that every individual has a part of his personal liberty the right to protect his health as he deems best to insure a long and happy life, and that fluoridation deprives him of this right in violation of the Federal . . . Constitution. . .
>
> There can be no disagreement with this basic principle, it having been long recognized as sound, and the authorities support the proposition.
>
> This right in an individual, however, is not an absolute but is subject to the police power of the state. *Id.* at 794. (citations omitted)

Furthermore, analysis of the claimed right to health in light of later holdings of the Supreme Court bolsters that in *Kraus*.

> The Court today does *not* 'pick out particular human activities, characterize them as "fundamental," and give them added protection. . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.' *Shapiro v. Thompson*, 394 U.S. at 642, 89 S. Ct. at 1335. (emphasis in original).

See also, Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862 (1972); *San Antonio Independent School District v. Rodriquez*, 422 U.S. 311, 93 S. Ct. 1278 (1973). In concert with *Kraus*, the court refuses to engraft a fundamental right to health onto the Fourteenth Amendment.

The court follows the Sixth Circuit holding in *Alkire v. Cashman*, 350 F. Supp. 360 (S.D. Ohio, 1972); *aff'd*, 477 F. 2d 598, *cert. denied*, 414 U.S. 858 (1973), that Ohio's fluoridation statute is a legitimate, rational and valid exrcise of its police powers which does not violate the due process or equal protection clauses of the Fourteenth Amendment:[9]

---

[9] Notwithstanding the holdings of *Alkire* and *Kraus* the plaintiffs rely on dicta from the case *City of Cincinnati ex rel Crotty v. City of Cincinnati*, 50 Ohio St. 2d 27, 361 N.E. 1340 (1977) to urge adoption of the due process claim. In *Crotty* the court dismissed an appeal because the court below lacked jurisdiction to entertain the claim and stated:

> A more difficult question is raised by the claim that fluoride is a carcinogen based on statistics that the cancer death rate has increased in certain cities with fluoridated water, while remaining the same in certain other cities

> "[I]t is settled in this state that fluoridation of a municipal water supply is a proper exercise of municipal police powers which does not violate either federal or state constitutional rights.
>
> * * *
>
> Courts, both state and federal, have held in virtual unanimity that fluoridation of public water systems does not violate the due process clause or constitutional rights incorporated by that clause of the Fourteenth Amendment to the United States Constitution.

Id. at 362 (citations omitted).

Accordingly, the complaint is dismissed for lack of a substantial federal question and failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1) and (6).

IT IS SO ORDERED.

John M. Manos
UNITED STATES DISTRICT JUDGE

---

[2] continued

> which do not fluoridate. The evidence for this claim has not been tested by litigation and is disputed by other authorities. This evidence has also been submitted to federal agencies and to the Congress. If scientifically proved, these claims *could* raise legitimate questions as to the constitutionality of fluoridation as a public health measure. (emphasis added)

Id. at 1341, 1342. While the dicta is noteworthy, the Court declines the opportunity to act as a "super-legislature," and leaves the task of overseeing and protecting public health to the Ohio legislature and their duly appointed experts in the Ohio Environmental Protection Agency.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNIE JEAN McQUAY, et al.,
Plaintiffs,

v.

CASE NO.
C80-375A

JAMES F. McAVOY, et al.,
Defendants.

Judge John M. Manos

MEMORANDUM OF OPINION
AND ORDER
Filed June 1, 1981
4:02 P.M.

On March 17, 1980, plaintiff Connie Jean McQuay and thirty-three other residents of Akron, Ohio filed the above-captioned case seeking to enjoin defendants James F. McAvoy, Ohio Director of Environmental Protection, William J. Brown, Ohio Attorney General, Roy Ray, Mayor of Akron, and David Crandell, Water Distribution Manager of the Akron Water Department from fluoridating the Akron public water system. 28 U.S.C. §§2201 and 2202. This suit was filed with a related case, *Mary Bellassai, et al. v. James McAvoy, et al.*, C80-376A. The complaints in both cases claim Ohio Revised Code §6109. *et seq.*, which mandates fluoridation of public water, unconstitutionally deprives them of the rights of life, and health in violation of the Fourteenth Amendment. 42 U.S.C. §1983.

The cause of action in the instant case is identical to its companion, *Mary Bellassai v. James McAvoy*, C80-376A, which was dismissed by the court on this day for want of substantial federal question and failure to state a claim upon which relief can be granted. Relying on the reasoning and authority cited in that opinion, and incorporating it by reference, the court similarly dismisses the instant cause of action for lack of jurisdiction. Fed. R. Civ. P. 12 (b)(1) and (6).

IT IS SO ORDERED.

John M. Manos
UNITED STATES DISTRICT JUDGE

NOS. 81-3371 and 81-3372

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY BELLASSAI, et al.,
Plaintiffs-Appellants,

v.

JAMES McAVOY, et at.,
Defendants-Appellees.

ORDER

CONNIE JEAN McQUAY, et al.,
Plaintiffs-Appellants,

v.

JAMES McAVOY, et al.,
Defendants-Appellees.

Filed July 7, 1982

Before: BROWN* and MARTIN, Circuit Judges; HORTON, District Judge.**

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled cases; and

---

* Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. §371(b) on June 16, 1982, and became a Senior Circuit Judge.

** The Honorable Odell Horton, United States District Judge for the Western District of Tennessee, sitting by designation.

No judge in active service on this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the cases; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's order,

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

Provisions of OHIO REVISED CODE chapter 6109 relevant to fluoridation

§6109.11 Complaint of impure water supply or lack of fluoride.

Whenever any person files with the environmental protection agency a complaint, in writing, setting forth that it is believed that water provided by a public water system is impure and dangerous to health or does not contain quantities of fluoride as required by section 6109.20 of the Revised Code, the director of environmental protection shall forthwith inquire into and investigate the conditions contained in the complaint.

§6109.14 Notice of danger of contamination, inadequate system or lack of fluoride.

When the director of environmental protection finds, upon investigation, that water in a public water system is subject to the danger of contamination by reason of unsatisfactory location, protection, construction, operation, or maintenance of the system, or by reason of the existence of an unsafe emergency system or connection to an unsafe private or auxiliary system, or if the director finds upon investigation that the public health is endangered by reason of the existence of an inadequate public water system, or that the system does not contain quantities of fluoride as required by section 6109.20 of the Revised Code, he shall notify the municipal corporation, county, public institution, or person, owning or operating such public water system of his findings and of the time and place, when and where a hearing may be had. Such notice shall be by personal service, or shall be sent by certified mail to the mayor or

managing officer or officers of the municipal corporation, county, or public institution or to the person owning or operating such supply.

§6109.15 Corrections and changes; notice.

After the hearing provided for in section 6109.14 of the Revised Code, if the director of environmental protection determines that improvements or changes are necessary and should be made, the director shall order the mayor or managing officer or officers of the municipal corporation, county, or public institution or other person owning or operating a public water system to make improvements, corrections, and changes in the location, protection, construction, operation, or maintenance of the system satisfactory to the director, so as to prevent the contamination of the water or to provide a system not subject to the danger of contamination, or to provide a system adequate to avoid endangering the public health or to provide required quantities of fluoride. Notice of the director's order shall be made by personal service upon or by certified mail to the mayor or managing officer or officers of the municipal corporation, county, or public institution or to the officials, corporation, partnership, or person to whom the order applies.

§6109.16 Order may be enforced by mandamus.

If the responsible officers of a municipal corporation, county, or public institution fail to submit to the director, within ninety days after receipt of notice of an order of the director of environmental protection under section 6109.15 of the Revised Code, plans for compliance with the order, or fail to perform any act required of them by such order within a reasonable time, the order may be

enforced by a writ of mandamus issued by any court authorized to issue such writ.

§6109.20 Fluoride to be added to public water system.

If the natural fluoride content of supplied water of a public water system is less than eight-tenths milligrams per liter of water, fluoride shall be added to such water to maintain fluoride content of not less than eight-tenths milligrams per liter of water nor more than one and three-tenths milligrams per liter of water beginning:

(A) On or before January 1, 1971, for a public water system supplying water to twenty thousand or more persons;

(B) On or before January 1, 1972, for a public water system supplying water to five thousand or more persons, but less than twnety thousand persons.

§6019.31 Violation of order, rule or variance prohibited.

No person shall violate Chapter 6109. of the Revised Code, or violate any order, rule, or term of a variance or exemption granted by the director of environmental protection pursuant to such chapter. Each day of noncompliance is a separate violation.

§6109.32 Investigations by director; attorney general to bring enforcement actions.

The director of environmental protection may on his own initiative investigate or make inquiries into any suspected violation of section 6109.31 of the Revised Code.

The attorney general, upon written request by the director, shall bring an action for injunction or other

appropriate action against any person violating or threatening to violate such section. In an action for injunction to enforce any final order of the director, the finding by the director, after hearing, is prima-facie evidence of the facts found therein.

§6109.33 Civil penalty for violation.

Any person who violates section 6109.31 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars for each violation, to be paid into the state treasury to the credit of the general revenue fund. The attorney general, upon written request by the director of environmental protection, shall bring an action for such penalty against any person who violates such section. Such action is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

Case No. C80-376A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARY BELLASSAI, JOSEPH BELLASSAI, LILLY AVELLINO, RITA BURT, EDITH B. FALCONE, JOSEPH FALCONE, VINCENT J. FALCONE, ROBERT JUENGEL, CONNIE M. LEONARD, DONALD A. MYERS, JAN MYERS, MILDRED G. NEEDELS, R.T. NEEDELS, BEATRICE PARADIS, KIM E. PARADIS, MARCEL PARADIS, SCOTT PARADIS, MICKEY PHILLIPS, JUNE PIERSON, TERRY RINEHART, WOODROW SANTEE, ROYCE D. SMART, KAROLA TEAGLE, and DAVID WOLFE,

Plaintiffs

-vs-

COMPLAINT

JAMES F. McAVOY
Ohio Director of Environmental Protection
361 East Broad Street
Columbus, Ohio 43215
and
WILLIAM J. BROWN
Ohio Attorney General
30 East Broad Street
Columbus, Ohio 43215
and

ROBERT QUIRK
Mayor of Cuyahoga Falls, Ohio
2310 Second Street
Cuyahoga Falls, Ohio 44221
and
LARRY VALENTINE
Director of the Cuyahoga Falls Water
Utilities Department
2310 Second Street
Cuyahoga Falls, Ohio 44221.
Defendants

JUDGE MANOS

Filed 3/17/80 at 2:03 p.m.

Plaintiffs allege:

1. The jurisdiction of this Court is invoked pursuant to Title 28 United States Code, sections 1343, 2201 and 2202 and Title 42 United States Code, section 1983.

2. Plaintiffs are citizens of the United States and of the State of Ohio with their domiciles in the area served by the public water supply of Cuyahoga Falls, Ohio and plaintiffs use this water.

3. Ohio Revised Code section 6109.20 (copy of Ohio Revised Code chapter 6109 attached as Exhibit 1) requires the addition of fluoride to the public water supply of public water systems in Ohio supplying water to five thousand or more persons so as to artificially create a level of fluoride in the water of between 0.8 and 1.3 parts per million.

4. Defendant James F. McAvoy is the Ohio Director of Environmental Protection: defendant William J. Brown is the Ohio Attorney General: and both these defendants have been enforcing, and under Ohio Revised

Code chapter 6109 are responsible for enforcing, the fluoridation of public water systems including that serving the plaintiffs.

5. In early 1979, defendant Director of Environmental Protection ordered the city of Cuyahoga Falls to fluoridate its water. Cuyahoga Falls appealed this order to the Environmental Board of Review (case no. 79 AP 232) on the basis that fluoridation had been rejected in 1969 by the city's residents in a referendum election. The Board affirmed the Director's order. On April 3, 1979, a notice of appeal was filed to the Court of Appeals of Franklin County pursuant to Ohio law. That court affirmed the Board and Director's decisions on October 17, 1979 (case no. 79-1560). The Ohio Supreme Court refused on January 11, 1980 to allow a further appeal, and Cuyahoga Falls has exhausted its appeals under Ohio law.

6. Cuyahoga Falls is currently under order from the Ohio Director of Environmental Protection to fluoridate its public water supply pursuant to Ohio Revised Code section 6109.20 by March 19, 1980.

7. Defendant Robert Quirk is mayor of Cuyahoga Falls and defendant Larry Valentine is Director of the Cuyahoga Falls Water Utilities Department, and they must cause fluoride to be added to the public water supply serving Cuyahoga Falls pursuant to Ohio Revised Code section 6109.20.

8. The Fourteenth Amendment to the United States Constitution secures all persons in the United States from State deprivation of their life, liberty or property without due process of law. Any State which, without some overriding necessity, takes or impairs life by creating a clear and present danger to public health and life violates the Fourteenth Amendment.

9. Under color of Ohio law, defendants are attempting to subject and - unless enjoined - will subject plaintiffs

and persons similarly situated to a deprivation of their Constitutionally protected right to life and health which is the basis of life. Fluoride, at the 0.8 to 1.3 parts per million added to the public water supply is a potent enzyme inhibitor and poison. Primarily because of these characteristics, fluoride, when consumed by humans in the public water supply, causes the following dangers to life and health:

A. Increased death rates from cancer, most pronounced among persons over age 45;
B. Genetic damage;
C. Chronic toxicity;
D. Additional allergic and intolerant reactions in hypersensitive individuals; and
E. Extraordinary damage to people with certain existing health problems, including diabetes, hypoglycemia, hypothyroidism, arthritis, and kidney ailments.

In addition, plaintiffs are constantly threatened with acute toxicity caused by additional overdoses of fluoride when water system employees err or fluoridation equipment malfunctions.

10. Plaintiffs Mary Bellassai, Joseph Bellassai, Lilly Avellino, Edith Falcone, Joseph Falcone, Robert Juengel, Connie M. Leonard, Mildred G. Needels, R.T. Needels, Beatrice Paradis, Marcel Paradis, June Pierson, and Woodrow Santee are over the age of 45 years.

11. Plaintiff Lilly Avellino has kidney ailments.

12. Plaintiff Karola Teagle has arthritis.

13. Some plaintiffs have health problems making them subject to the additional harms listed in subparagraphs 9.D. and 9.E. above.

14. Plaintiffs must drink water and fluids to sustain life. All beverages and foods canned or prefared with fluoridated water in food processing and bottling plants,

restaurants, and homes in the area served by the Cuyahoga Falls public water supply will contain fluoride unless defendants are enjoined, and plaintiffs cannot avoid ingestion of the fluoride added to the public water supply.

15. Plaintiffs have no adequate or complete remedy at law. Unless this Court enjoins the defendants from causing fluoride to be introduced into public water supplies, irreparable harm will be done to the health and life of plaintiffs and other users of the public water supply.

WHEREFORE, plaintiffs respectfully demand judgment:

1. Declaring that the actions of defendants James F. McAvoy, William J. Brown, Robert Quirk, and Larry Valentine in enforcing the addition of fluoride to public water supplies pursuant to Ohio Revised Code chapter 6109 is illegal and unconstitutional;

2. Entering a preliminary and permanent injunction restraining, prohibiting and enjoining the defendants, their agents, employees, successors, and all persons in active concert and participation with them from enforcing or implementing the provisions of Ohio Revised Code chapter 6109 requiring the addition of fluoride to public water supplies;

3. Awarding plaintiffs the costs of this action and reasonable attorneys' fees; and

4. Granting plaintiffs such other and further relief as may be just.

/s/ James DeWeese

Robert C. Hunt
Teodosio, Cherpas & Manos
907 Akron Savings & Loan Building
Akron, Ohio 44308
(216) 535-1555

John Remington Graham
212 West Franklin Avenue
Minneapolis, Minnesota 55404
(612) 871-8885

James De Weese
Inscore, Rinehardt & Whitney
3 North Main Street
Mansfield, Ohio 44902
(419) 522-2733

Attorneys for the Plaintiffs

Case No. C80-375A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNIE JEAN McQUAY, MARY ARCHER, AMY M. ARNOLD, JOSEPHINE ARONICA, M. D., EUNABELLE B. BLACKWOOD, Ph.D., JOHN B. BENDER, MARIAN BENSINGER, AUDREY J. BINGHAM, KATHLEEN CIANCHETTI, HILDA L. CONNER, MERLIN CORRELL, LAURIE DAVIS, RENEE M. GARDNER, SHARON HAMMOND, IRENE S. HARRISON, VIRGINIA K. HODGES, ROBERT J. HROVAT, IDA INGRAM, MARK INGRAM, MARGARET KANFIRE, RHEA KATS, KATHRYN LAWRENCE, WALTER LAWRENCE, CONSTANCE LETTA, BLANCHE MAY, CHLORA McGOUGH, KENNETH E. MEADOWS, JOHN L. PEFFER, SALLY PLATNER, MARY A. PRETE, CYNTHIA SMITH, MILDRED J. SNYDER, KATHERINE SOMMER, KAREN TAQUINO, and ELEANOR WARNER,

Plaintiffs

-vs-

COMPLAINT

JAMES F. McAVOY
Ohio Director of Environmental Protection
361 East Broad Street
Columbus, Ohio 43215

and
WILLIAM J. BROWN
Ohio Attorney General
30 East Broad Street
Columbus, Ohio 43215
and
ROY RAY
Mayor of Akron, Ohio
Church and High Streets
Akron, Ohio 44308
and
DAVID CRANDELL
Water Distribution Manager of the
Akron Water Department
65 South High Street
Akron, Ohio 44311,

Defendants

JUDGE MANOS

Filed 3/17/80 at 2:03 p.m.

Plaintiffs allege:

1. The jurisdiction of this Court is invoked pursuant to Title 28 United States Code, sections 1343, 2201 and 2202 and Title 42 United States Code, section 1983.

2. Plaintiffs are citizens of the United States and of the State of Ohio with their domiciles in the area served by the public water supply of Akron, Ohio, and plaintiffs use this water.

3. Ohio Revised Code section 6109.20 (copy of Ohio Revised Code chapter 6109 attached as Exhibit 1) requires the addition of fluoride to the public water supply of public water systems in Ohio supplying water to five thousand or more persons so as to artificially create a

level of fluoride in the water of between 0.8 and 1.3 parts per million.

4. Defendant James F. McAvoy is the Ohio Director of Environmental Protection; defendant William J. Brown is the Ohio Attorney General; and both these defendants have been enforcing, and under Ohio Revised Code chapter 6109 are responsible for enforcing, the fluoridation of public water systems including that serving the plaintiffs.

5. Defendant Roy Ray is mayor of Akron and defendant David Crandell is Akron's Water Distribution Manager and they are causing fluoride to be added to the public water supply serving Akron pursuant to Ohio Revised Code section 6109.20.

6. The Fourteenth Amendment to the United States Constitution secures all persons in the United States from State deprivation of their life, liberty or property without due process of law. Any State which, without some overriding necessity, takes or impairs life by creating a clear and present danger to public health and life violates the Fourteenth Amendment.

7. Under color of Ohio law, defendants are subjecting plaintiffs and persons similarly situated to a deprivation of their Constitutionally protected right to life and health which is the basis of life. Fluoride, at the 0.8 to 1.3 parts per million added to the Akron public water supply is a potent enzyme inhibitor and poison. Primarily because of these characteristics, fluoride, when consumed by humans in the public water supply, causes the following dangers to life and health:

A. Increased death rates from cancer, most pronounced among persons over age 45;
B. Genetic damage;
C. Chronic toxicity;
D. Additional allergic and intolerant reactions in hypersensitive individuals; and

E. Extraordinary damage to people with certain existing health problems, including diabetes, hypoglycemia, hypothyroidism, arthritis, and kidney ailments.

In addition, plaintiffs are constantly threatened with acute toxicity caused by additional overdoses of fluoride when water system employees err or fluoridation equipment malfunctions.

8. Plaintiffs Mary Archer, Josephine Aronica, M.D., John B. Bender, Marian Bensinger, Audrey Bingham, Merlin Correll, Irene S. Harrison, Virginia K. Hodges, Ida Ingram, Rhea Kats, Blanche May, Chlora McGough, Kenneth E. Meadows, John L. Peffer, Mary A. Prete, Mildred J. Snyder, and Eleanor Warner are over the age of 45 years.

9. Plaintiff Sally Platner and some other plaintiffs are hypersensitive and experience allergic responses to certain chemicals like fluoride.

10. Plaintiffs Merlin Corell and Mary A. Prete have arthritis.

11. Plaintiffs Audrey J. Bingham and Mary A. Prete have diabetes.

12. Some other plaintiffs have health problems making them subject to the additional harms listed in subparagraph 7.E. above.

13. Plaintiffs must drink water and fluids to sustain life. All beverages and foods canned or prepared with fluoridated water in food processing and bottling plants, restaurants, and homes in the area served by Akron public water supply contain fluoride, and plaintiffs cannot avoid ingestion of the fluoride added to the public water supply.

14. Plaintiffs have no adequate or complete remedy at law. Unless this Court enjoins the defendants from causing fluoride to be introduced into public water

supplies, irreparable harm will be done to the health and life of plaintiffs and other users of the public water supply.

WHEREFORE, plaintiffs respectfully demand judgment:

1. Declaring that the actions of defendants James F. McAvoy, William J. Brown, Roy Ray, and David Crandell in enforcing the addition of fluoride to public water supplies pursuant to Ohio Revised Code chapter 6109 is illegal and unconstitutional;

2. Entering a preliminary and permanent injunction restraining, prohibiting and enjoining the defendants, their agents, employees, successors, and all persons in active concert and participation with them from enforcing or implementing the provisions of Ohio Revised Code chapter 6109 requiring the addition of fluoride to public water supplies;

3. Awarding plaintiffs the costs of this action and reasonable attorneys' fees; and

4. Granting plaintiffs such other and further relief as may be just.

/s/ James DeWeese

Robert C. Hunt
Teodosio, Cherpas & Manos
907 Akron Savings & Loan Building
Akron, Ohio 44308
(216) 535-1555

John Remington Graham
212 West Franklin Avenue
Minneapolis, Minnesota 55404
(612) 871-8885

James DeWeese
Inscore, Rinehardt & Whitney
3 North Main Street
Mansfield, Ohio 44902
(419) 522-2733

Attorneys for the Plaintiffs

A-52

Case No. C80-376A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Mary Bellassai, et al.,

Plaintiffs,

-vs-

James F. McAvoy, et al.,

Defendants.

STATE OF OHIO)
COUNTY OF DELAWARE) ss.

AFFIDAVIT OF JOHN YIAMOUYIANNIS
IN SUPPORT OF TEMPORARY
RESTRAINING ORDER

I, JOHN YIAMOUYIANNIS, Ph. D., being duly sworn, depose and say:

1. I am a recognized expert on the biological effects of fluoridation and hold the degree of Doctor of Philisophy in biochemistry. I have read over 12,000 scientific articles or abstracts of scientific articles on fluoride and have myself authored over 20 articles on fluoride. I am co-editor of the scientific journal, *Fluoride*, published quarterly by the International Society for Fluoride Research. I am the Science Director of the National Health Federation, the country's largest private nonprofit consumer health group, and have held this position since 1974. As such, I am responsible for recommending health issues to be considered and scientific positions to be taken by the National Health Federation. Among these issues is fluoridation.

2. I have examined the cancer death rates of the ten largest U.S. cities which began fluoridation between 1952 and 1956 and compared these cancer death rates to those of the ten largest cities not fluoridated as of 1969, but with comparable cancer death rates between 1940 and 1950. This study used double-blind design and sample size of approximately 20,000,000 persons. I found:

a. that there has been a more rapid (5% greater) increase in cancer death rate in fluoridated than in nonfluoridated areas; and that this increase did not occur until shortly after fluoridation began. This amounts to 10,000 fluoridation-linked cancer deaths occurring in the United States each year.

b. that this fluoridation-linked increase in cancer death rate occurred primarily in persons 45-64 and 65+ years of age.

c. that this fluoridation-linked increase in cancer death rates could not be attributed to changes in the racial or sexual compositions of the fluoridated and nonfluoridated population.

These results were published in the following paper:

i. J.A. Yiamouyiannis and Dean Burk (former Chief Chemist of the National Cancer Institute). "Fluoridation and Cancer: Age-Dependence of Cancer Mortality Related to Artificial Fluoridation", *Fluoride 10 (3):* 102-123 (1977).

Reexamination of these results by adjusting for age, race, and sex simultaneously confirmed a 5% greater increase in the cancer death rate in fluoridated cities than in nonfluoridated cities. These results were published in the following paper:

ii. J.A. Yiamouyiannis, "Fluoridation and Cancer" *The National Cancer Program (Pt. 2-Fluoridation of Public Drinking Water). Hearings before the Subcommittee on*

Inter-governmental Relations and Human Resources of the Committee on Government Operations, U.S. House of Representatives, 95th Congress, First Session, September 21 and October 12, 1977, pp. 61-72.

3. A number of studies by other scientists also indicate that ingestion of fluoridated water increases cancer mortality:

iii. G.L. Waldbott, et al., *Fluoridation, The Great Dilemma,* 1978, pp.219-238.

iv. V.A. Cecilioni, *The National Cancer Program (Part 2 - Fluoridation of Public Drinking Water). Hearings Before the Subcommittee on Intergovernmental Relations and Human Resources of the Committee on Government Operations, U.S. House of Representatives, 95th Congress, First Session, September 21 and October 12, 1977,* pp. 258-261.

v. A.H. Mohamed and M.E. Chandler, *Cytological Effects of Sodium Fluoride on Mice, Ibid,* pp. 42-60.

vi. A. Taylor and N. C. Taylor, *Effect of Sodium Fluoride on Tumor Growth, Proceedings of the Society of Experimental Biology and Medicine* 119: 252-255 (1965).

vii. A. Taylor, *Sodium Fluoride in the Drinking Water of Mice, Dental Digest 60:* 170-2 (1954).

viii. W. Klein, et al., *DNA Repair and Environmental Substances, Report of the Austrian Society of Atomic Energy, Seibersdorf Research Center (Berichte der Osterreichischen Studiengesellschaft fur Atomenergie Forschungszentrum Seibersdorf) (2613):* 1-8, 1976.

ix. W. Klein, et al., *Biochemical Research on the Mode of Action of Sodium Fluoride on Mammalian Cells.* II. *Effect on the Biosynthesis of Nucleic Acids and Protein of Mouse Spleen Cells in in Vivo Studies, Ibid, (2355):* 1-10, 1974.

x. I. H. Herskowitz and I. L. Norton, *Increased Incidence of Melanotic Tumors in Two Strains of Drosophila Melanogaster Following Treatment with Sodium Fluoride, Genetics 48:* 307-10, Feb. 1963.

xi. T. Okamura and T. Matsuhisa, *Studies on Fluoride and other Related Material in Rice.* I. *The Fluoride Content of Lowland Nonglutinous Unpolished Rice and its Geographical Correlation with Mortality from Gastric Cancer, Nippon Sakumotsu Gakkai Kiji 32:* 132-8, 1963.

4. That fluoride causes genetic damage is well documented. In addition to the study cited in paragraph 3 (v), the following partial list of studies shows that fluoride causes genetic damage:

i. S. S. Bale and G. E. Hart, *Cytogenetic and Genetic Effects of Fluoride on Barley. I. Comparative Study of the Effects of Sodium Fluoride and Hydrofluoric Acid on Seedling Root Tips, Canadian Journal of Genetics and Cytology 15:* 695-702, 1973.

ii. S. S. Bale and G. E. Hart, *Cytogentic and Genetic Effects of Fluoride on Barley. II. Effects of Treatments of Seedling Coleoptiles with Sodium Fluoride, Ibid, 15:* 703-12, 1973.

iii. A. H. Mohamed, H. G. Applegate and J. D. Smith, *Cytological Reactions Induced by Sodium Fluoride in Allium Cepa Root-Tip Chromosomes, Canadian Journal of Genetics and Cytology 8:* 241-4, 1966.

iv. R. N. Mukherjee and F. H. Sobels, *The Effects of Sodium Fluoride and Iodoacetamide on Mutation Induction by X-irradiation in Mature Spermatazoa of Drosophila, Mutation Research 6:* 217-25, Sept.-Oct. 1968.

v. A. H. Mohamed, H. G. Applegate and J. D. Smith, *Cytological Effects of Hydrogen Fluoride on Tomato Chromosomes, Ibid, 8:* 575-83, 1966.

vi. B. Mitchell and R. A. Gerdes, *Mutagenic Effects of NaF and SnF_2 on Drosophila Melanogaster, Fluoride 6 :* 113-7, 1973.

vii. E. G. Plotko, E. Z. Gatiyatullina and E. A. Gileva, *Cytogenic Effect of Inorganic Fluorine Compounds on Human and Animal Cells in Vivo and In Vitro, Genetika 9:* 115-20, 1973.

viii. E. G. Plotko, V. A. Kostlyuchenka and E. N. Panycheva, *Toxicity of Weakly Soluble F- Introduced by Inhalation, Giq. I Sanit. 4:* 14-16, 1973.

ix. G. Jagiello and J. Lin, *Sodium Fluoride as Potential Mutagen in Mammalian Eggs, Archives of Environmental Health 29:* 230-35, 1974.

x. A. H. Mohamed, *Fluorides in Water may be Genetic Hazard, Chemical and Engineering News 54:* 30, 1976.

5. Drinking fluoridated water causes allergic or intolerant reactions in hypersensitive persons. Studies showing these effects have been reported by Dr. Hans Moolenburgh, Dr. George Waldbott, Dr. Reuben Feltman, and others. As a matter of fact the 1979 Physicians Desk Reference warns at page 1692: "In hypersensitive individuals, fluorides occasionally cause skin eruptions such as atopic dermatitis, eczema, or urticaria. Gastric distress, headache, and weakness have also been reported. These hypersensitive reactions usually disappear promptly after discontinuation of the fluoride." These symptoms result merely from the ingestion of the amount of fluoride found in just one pint of fluoridated water.

6. The extensive evidence of chronic toxicity from fluoride, expecially among those with existing health problems such as diabetes, hypoglycemia, hypothyroidism, kidney ailments, and arthritis, is discussed in *Fluordation, The Great Dilemma* authored by Dr. George Waldbott, Dr. Albert Burgstahler, and Dr. Lewis McKinney and published by Coronado Press in 1978.

7. On November 11, 1979, 1000 gallons of fluoride which was to be used to fluoride the public water system was spilled into the Annapolis drinking water and the fluoride content reached levels of over 30 parts per million. Eight patients on kidney machines using this water became violently ill, two of them suffered cardiac arrest and one died. Dr. George Waldbott made an investigation to see if those drinking the water had been adversely affected. Of 103 who complained of problems during the spill, Dr. Waldbott confirmed that 100 of them were suffering from fluoride poisoning. In follow-up studies, I was able to confirm that approximately 25% of the 35,000 residents of Annapolis had shown acute symptoms of fluoride poisoning. Using a smaller sample size, the U. S. Center for Disease Control found "suggestive evidence" that 13 of 70 persons interviewed or 19% of those interviewed were poisoned by the fluoride spill. From this and other similar spills such as Harbor Springs, Michigan, Marin County, California, and Stanley County, North Carolina, it is quite evident that with water fluoridation systems, there is a grave threat of massive acute fluoride poisoning from accidents, not to mention the chronic poisoning that occurs in persons exposed to 1 part per million fluoride in their drinking water.

8. Although attempts have been made, no laboratory experiment has ever shown that the addition of 1 part per million fluoride to the drinking water is effective in reducing tooth decay. Furthermore, there has never been one double-blind epidemiological study showing that the addition of 1 part per million to the drinking water reduces tooth decay among humans. A double-blind study is one in which both the examiner and those being examined are unaware of who is being treated and who is not. Thus, there is no scientific evidence showing that the addition of 1 part per million fluoride to the

drinking water reduces tooth decay and the evidence that has been used to support the claim that fluoridation reduces tooth decay is anecdotal and relies on hearsay.

/s/ John Yiamouyiannis

Sworn to and subscribed before me this 15th day of March, 1980.

/s/ James DeWeese
Notary Public
My commission has no expiration date.

Office - Supreme Court, U.S.
FILED
OCT 8 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82–394

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

MARY BELLASSARI, et al.,
Petitioner-Plaintiffs,

v.

JAMES McAVOY, et al.,
Respondents-Defendants.

CONNIE JEAN McQUARY, et al.,
Petitioners-Plaintiffs,

v.

JAMES McAVOY, et al.,
Respondents-Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BROWN
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

EDWARD D. HAYMAN
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

Counsel of Record for Respondents McAvoy and Brown

GERALD PURSLEY
Law Director, City of Cuyahoga Falls

Counsel for Respondents Quirk and Valentine

ROBERT D. PRATT
Law Director, City of Akron

RANDALL A. COLE
Chief Assistant Director of Law
304 Municipal Building
Akron, Ohio 44308
(216) 375-2032

Counsel for Respondents Ray and Crandall

QUESTION PRESENTED

WHETHER A FEDERAL COURT CAN REVIEW THE WISDOM OF A DECISION OF A STATE LEGISLATURE ON A PUBLIC HEALTH ISSUE CONCERNING WHICH THERE IS CONFLICTING EVIDENCE AND WHICH INVOLVES THE WEIGHING ON CONFLICTING RISKS AND BENEFITS TO DIFFERENT SEGMENTS OF THE PUBLIC?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE..... 1
SUMMARY OF ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT 2
ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT 3
CONCLUSION 18
CERTIFICATE OF SERVICE..... 20

TABLE OF AUTHORITIES

Page

Cases:

Alkire v. Cashman,
305 F. Supp. 360 (S.D. Ohio, 1972), aff'd,
447 F.2d 598 (C.S. 6, 1973) *cert. denied*,
414 U.S. 858 (1973) 10, 11

Attaya v. Town of Gonzalez,
192 So.2d 188, 193 (La. App. 1966) 13

Baer v. City of Beard,
206 Or. 221, 292 P.2d 134 (1956) 12

Berman v. Parker,
348 U.S. 26 (1954) 9

Birnel v. Town of Fircrest,
53 Wash. 2d 830, 335 P.2d 819 (1959);
appeal dismissed, 361 U.S. 10 (1959) 12

Canton v. Whitman,
44 Ohio St. 2d 62, 337 N.E.2d 766 (1975),
appeal dismissed, 425 U.S. 956 (1976) 12

Chapman v. City of Shreveport,
225 La. 859, 74 So.2d 142 (1954),
appeal dismissed, 3618 U.S. 892 (1954) 12, 13

Collins v. State of Texas,
223 U.S. 228, 298 (1912) 11

Crawford v. City of Detroit,
389 F.2d 1001 (C.A. 6, 1968) 9

Cusak v. City of Chicago,
242 U.S. 526, 531 (1917) 9

Day-Bright Lighting v. State of Missouri,
342 U.S. 421, 423 (1952) 9

DeAryan v. Butler,
119 Cal. App. 2d 674, 260 P.2d 98 (1953),
cert. denied, 347 U.S. 1012 (1954) 12, 13, 14

Dowell v. City of Tulsa,
273 P.2d 859, 43 A.L.R.2d 445 (Okla. 1954);
cert. denied, 348 U.S. 912 (1955) 12, 13

Federal Employees for Non-smokers' Rights v. United States, 466 F. Supp. 181, 185
(D.C.C. 1978) 7

TABLE OF AUTHORITIES, *contd.*

Page

Cases:

Ferguson v. Skrupa,
372 U.S. 726, 729-730 (1863) 3, 8
Froncek v. City of Milwaukee,
269 Wisc. 276, 69 N.W. 2d 242 (1955).....12
Gasper v. Louisiana Stadium and Exposition District,
418 F. Supp. 716 (E.D. La. 1976), affirmed,
577 F.2d 897 (C.A. 5, 1978), rehearing denied,
581 F.2d 267, *cert. denied,* 439 U.S. 1079
(1979).....6, 7
Graybowl v. McNevin,
439 S.W. 2d 323, 330-331 (Kent, 1969).....13
Hall v. Bates,
247 S.C. 511, 148 S.E. 2d 345, 346 (1966) 14
Hodel v. Indiana,
452 U.S. 314, 333 (1981).....9
Jacobson v. Massachusetts,
197 U.S. 11 (1905).....9, 15
Jenkins v. McKeithen,
395 411, 421-422 (1969) 15, 17
Kraus v. City of Cleveland,
163 Ohio St. 559, 122 N.E. 2d 609 (1955),
appeal dismissed, 351 U.S. 935 (1956) 12
Lambert v. Yellowley,
272 U.S. 581, 590, 594, 596 (1926).....9
Laurel Hill Cemetery v. City and County of
San Francisco, 216 U.S. 358, 365-366
(1910).....9
Minnesota State Board of Health v. City of
Brainard, 241 N.W. 2d 624 (1976),
appeal dismissed, 429 U.S. 803 (1976) 11, 13
Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456, 464 (1981).....9, 10, 17
New Oreleans v. Duke,
427 U.S. 297 (1976).....9

TABLE OF AUTHORITIES, *contd.*

Page

Cases:

Paduano v. City of New York,
45 Misc. 2d 718, 257 N.Y.S. 2d 531, *affirmed,*
24 App. Div. 2d 437, 260 N.Y.S.2d 831 (1965),
affirmed, 17 N.Y. 2d 875, 271 N.Y.S.2d 305,
218 N.E. 2d 339 (1966), *cert. denied,* 385 U.S.
1026 (1967) 12

Price v. Illinois,
238 U.S. 446, 451-452 (1915) 9

Readey v. St. Louis County Water Co.,
352 S.W.2d 622 (1961), *appeal dismissed,*
371 U.S. 8 (1962) 12, 13

Schuringa v. City of Chicago,
30 Ill. 2d 504, 198 N.E. 2d 326 (1964);
cert. denied, 379 U.S. 964 (1965) 12, 14

Standard Oil Co. v. City of Marysville,
279 U.S. 582, 584 (1929) 9

Tanner v. Armco Steel Corp.,
304 F. Supp. 532 (S.D. Tex. 1972) 5

Teeter v. Municipal City of LaPorte,
236 Ind. 146, 139 N.E.2d 158 (1956) 12

United States v. Carolene Products,
304 U.S. 114, (1938) 8, 9, 10

Vance v. Bradley,
440 U.S. 93, 111-112 (1979) 9, 18

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., _____U.S._____, 102 S. Ct.
1186, 1196 (1982) 9

Wilson v. City of Council Bluffs,
253 Iowa 162, 110 N.W.2d 569 (1961) 12

TABLE OF AUTHORITIES, *contd.*

Page

Statutes and Regulations:

Ohio Revised Code Chapter 6109 3,4,10,11
Ohio Revised Code Section 6111.13 11
Ohio Revised Code Section 6109.20 1,2,10,11,17,18
42 U.S.C. Section 1983 6

STATEMENT OF THE CASE

On March 17, 1980, the Petitioners (hereinafter referred to as "the Complaining Citizens" or "Citizens") filed two separate actions in the United States District Court for the Northern District of Ohio. One action challenged the constitutionality of the fluoridation of the public water supply at Cuyahoga Falls, Ohio, as required by Section 6109.20 of the Ohio Revised Code and named as defendants the Attorney General of Ohio, the Director of the Ohio Environmental Protection Agency and various officials of the city. The other action challenged the fluoridation of the public water supply system of the City of Akron as required by Ohio Revised Code Section 6109.20 and named as defendants, the Ohio Attorney General, Ohio Director of Environmental Protection and various officials of the City of Akron. All defendants in both cases before the district court are referenced in this brief collectively as Respondents. The essence of both complaints below was that the Complaining Citizens alleged that they were users of the public water supplies at issue and the addition of fluoride to those water supplies would cause the Citizens various health problems, including cancer. The complaints were supported by an affidavit from a Doctor John Yiamouyignnis in which he claimed that fluoridation causes the various health problems alleged in the complaints.

The Ohio Attorney General and the Director of Environmental Protection filed answers alleging numerous defenses, including lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Shortly thereafter, they filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6). In essence, the Attorney General and Director of Ohio EPA alleged, *inter alia*, that after almost thirty years of litigation concerning the constitutionality of fluoridation there was no longer a substantial constitutional question

concerning the lawfulness of fluoridation. On June 1, 1981, the federal district judge, John M. Manos, granted the motion to dismiss in both cases.

The Complaining Citizens filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit from this ruling on June 19, 1981 and moved to consolidate the two cases. This motion was granted. Oral argument was held on May 18, 1982. On May 24, 1982, the court issued its decision affirming the district court. The court of appeals indicated that it took judicial notice that there existed scientific opinion holding that fluoridation was not harmful to health. On June 3, 1982, the Complaining Citizens moved for rehearing which was denied by the Sixth Circuit on July 7, 1982. On September 7, 1982, the Citizens filed their petition for a writ of certiorari with this Court.

SUMMARY OF ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT

The Complaining Citizens are attempting to litigate the wisdom of the Ohio General Assembly's decision, as expressed in Section 6109.20 of the Ohio Revised Code, to require fluoridation of public water supplies in Ohio. Numerous decisions of this Court, however, establish that the wisdom of such legislative judgments are not reviewable by the federal courts. The federal courts are limited to determining whether the legislature's basis for enacting the fluoridation statute is at least debatable. After almost thirty (30) years of litigation concerning the validity of fluoridation statutes, the differences of opinion in the scientific community concerning the risks and benefits of fluoridation clearly establish that there is at least a debatable basis for the Ohio legislature's decision to require fluoridation. Therefore, the Complaining Citizens' allegations of unconstitutionality should be rejected.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

THE OHIO GENERAL ASSEMBLY'S ENACTMENT OF CHAPTER 6109 OF THE OHIO REVISED CODE IS A LEGISLATIVE JUDGMENT CONCERNING THE RISKS AND BENEFITS OF PUBLIC WATER SUPPLY FLUORIDATION AND THE WISDOM OF THAT LEGISLATIVE DETERMINATION IS BEYOND THE REVIEW OF THE FEDERAL COURTS.

A. The Essence Of The Complaining Citizens' Claims Is An Attempt To Use The Judicial Process To Foist Upon All Other Members Of The Public The Complaining Citizens' Theories Of Good Health.

In their complaints which were dismissed below the Complaining Citizens allege that the fluoride added to the public water supplies of Cuyahoga Falls and Akron, Ohio, as required by Chapter 6109 of the Ohio Revised Code, causes many health problems including cancer. From this allegation the Citizens leap to the conclusion that a federal court has jurisdiction to review the evidence concerning the wisdom of the enactment of the fluoridation statute and declare it to be unconstitutional. The Complaining Citizens' fantastic leap, however, overlooks several flaws in their assumptions which, when appreciated, glaringly expose their action to be an invitation for the federal courts to act as a superlegislature, an approach which this Court has consistently rejected since the end of the substantive due process era. See **Ferguson v. Skrupa**, 372 U.S. 726, 729-730 (1963).

As will be established in this brief, the Citizens' arguments overlook the fact that fluoridation has been almost universally recognized as the most effective weapon in the public arsenal against one of the most widespread public health problems, dental caries, i.e., tooth decay. In addition, the Complaining Citizens disregard the fact that numerous authorities dispute the opinion of the individual relied upon by the Citizens, Dr. John Yiamouyiannis, who claims that fluoridation causes cancer and other medical problems. Thus, the Complaining Citizens seek to have a federal court perform the legislative function of balancing the benefits of fluoridation with the risks, if any, and determine that the elected representatives of the people in the Ohio General Assembly have erroneously balanced those risks and benefits. Even this, however, is not the end of the Complaining Citizens' attempt to transform the federal court into a superlegislature.

Nothing in Chapter 6109 of the Ohio Revised Code compels the Complaining Citizens to use public water supply systems if they do not like the type of water being provided by it. In no way is a restriction imposed upon their liberty and freedom to use other sources of water which conform to their notions of good health. But this freedom is not enough for the Complaining Citizens. Instead they seek a decision which by banning the use of fluoridation compels all citizens, including those who are willing to assume the risks, if any, of fluoridation in exchange for its benefits, to conform to the Complaining Citizens' views of good health. In essence, in the action which they filed below the Complaining Citizens seek not to enhance their own freedom to use non-fluoridated water, but rather to restrict the liberty of their fellow citizens to choose in favor of the health benefits of fluoridation.

Within the dynamic reflexibility of the political process those who wished to enjoy the benefits of fluoridation were victorious. The Complaining Citizens' action in the district court is thus nothining more than an attempt to reverse the political process and impose upon all the people of Ohio the Complaining Citizens' views of proper health. If the Complaining Citizens' tactics are upheld, it would create a mechanism by which the most conservative, risk-fearing citizen can slow down the rest of society to his pace of non-advancement. Thus, the crux of the Complaining Citizens claims is minority rule through judicial fiat, rather than majority rule through democratic government.

During the past fifteen (15) years, as the nation has become more environmentally conscientious, there has been an increasing use of the federal courts by segments of society which seek to have their views of environmental health imposed upon the rest of society by judicial order. Such attempts, however, have been repeatedly rejected by the courts. Thus, in **Tanner v. Armco Steel Corp.**, 340 F. Supp. 532 (S.D. Tex. 1972), the court declined to award damages for alleged pulmonary disease which the plaintiff claimed to have been caused by defendant's air pollution in violation of the plaintiff's constitutional right to health. The court explained:

> [F]rom an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes. Furthermore, the inevitable trade-

> off between economic and ecological values presents a subject matter which is inherently political, and which is far too serious to relegate to the *ad hoc* process of "governn nt by lawsuit" in the midst of a statutory vacuum. *Id.* at 536-537.

In **Gasper v. Louisiana Stadium and Exposition District,** 418 F. Supp. 716 (E.D. La. 1976), affirmed, 577 F.2d 897 (C.A. 5, 1978), rehearing denied, 581 F.2d 267, *cert. denied,* 439 U.S. 1073 (1979), the court also rejected a claimed constitutional right to an environment free of unhealthy pollutants. In that case Plaintiffs brought a 42 U.S.C. Section 1983 action alleging that there should be a ban on smoking in the Louisiana Superdome because the smoke was hazardous to the health of non-smokers. Once again the court correctly characterized the suit as an attempt to use the Constitution to foist one group's perception of environmental quality and health upon everyone else. The court declared that:

> [T]he courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments. *** Accordingly, if this Court were to recognize that the Fifth and Fourteenth Amendments provide the judicial means to prohibit smoking, it would create a legal avenue, heretofore unavailable, through which an individual could attempt to regulate the social habits of his neighbor. This Court is not prepared to accept the proposition that life-tenured members of the federal judiciary should engage in such basic adjustments of individual behavior and liberties. 418 F. Supp. at 741.

In a similar manner the court in **Federal Employees for Non-smokers' Rights v. United States**, 466 F. Supp. 181, 185 (D.D.C. 1978), rejected an argument from non-smokers that smoking in public buildings interfered with their constitutional right to a healthy environment. The **Federal Employees** court noted that the theory of a right to a healthful environment was an attempt to use the judiciary to promote one group's view of health over another group's views and concluded:

> [T]he Court firmly believes that such matters are better left to the legislative process, where a proper balancing of interests can be made in a forum where such social decisions can more appropriately be made. *Id.* at 185.

As in **Gasper**, *supra*, and **Federal Employees**, *supra*, the Complaining Citizens in the case at bar are seeking to create a constitutional right to health so that by means of the judicial process they can impose upon society their view that good health is the absence of the potential toxic affects of fluoride rather than the currently prevailing view that the presence of fluoride adds to good health because it reduces dental caries (tooth decay). This political decision should be and has been made in this state by the Ohio General Assembly. Thus, as in **Gasper**, *supra*, and **Federal Employees**, *surpa*, the Complaining Citizens should not be permitted to use the judicial fiction of a right to a health to circumvent the legislative process.

Both of the courts below declined the Complaining Citizens' invitation to act as a superlegislature. The Court of Appeals did not, however, cite any specific decision of this Court, relying instead upon **Federal Employees**, *supra*. As a result, the Complaining Citizens argue that the Sixth Circuit's decision is inconsistent

with certain decisions of this Court. In the next section of this brief, the Respondents will establish that the uniform refusal of all the federal courts, including the Sixth Circuit, to act as a superlegislature and make their own legislative judgments as to how the risks and benefits of living in a complex society should be allocated is entirely consistent with the holdings of this Court.

B. This Court Has Repeatedly Held That The Judiciary May Not Substitute Its Policy Judgment For That Of The Legislature On A Matter Which Is Reasonably Debatable.

1. The Constitution prohibits the federal courts from reevaluating the wisdom of legislation.

In **Ferguson v. Skrupa**, *supra*, this Court declared that:

> Under the system of government created by the Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.
>
> * * * *
>
> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. *Id.* at 729-730.

The judiciary's scope of review is limited to determining whether the legislation is "at least debatable." **United**

States v. Carolene Products, 304 U.S. 144, 154 (1938). As a result, this Court has clearly and unambigiously declared that:

> Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends public welfare. **Day-Brite Lighting v. State of Missouri**, 342 U.S. 421, 423 (1952).

Thus, "States are not required to convince the courts of the correctness of their legislative judgments." **Minnesota v. Clover Leaf Creamery Co.**, 449 U.S. 456, 464 (1981). Indeed, this Court's refusal to review the wisdom of legislation is reflected in a virtually unending litany of cases in addition to those previously cited. See for example, **Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.**, _____U.S._____, 102 S. Ct. 1186, 1196 (1982); **Hodel v. Indiana**, 452 U.S. 314, 333 (1981); **Vance v. Bradley**, 440 U.S. 93, 111-112 (1979); **New Orleans v. Duke**, 427 U.S. 297 (1976); **Berman v. Parker**, 348 U.S. 26 (1954).

Furthermore, this refusal to review the wisdom of legislation is not confined merely to the area of economic regulation but also includes measured designed to protect or enhance public health. **Minnesota v. Clover Leaf Creamery Co.**, *supra;* **Hodel v. Indiana**, *supra;* **Standard Oil Co. v. City of Marysville**, 279 U.S. 582, 584 (1929); **Lambert v. Yellowley**, 272 U.S. 581, 590, 594, 596 (1926); **Cusack v. City of Chicago**, 242 U.S. 526, 531 (1917); **Price v. Illinois**, 238 U.S. 446, 451-452 (1915); **Collins v. State of Texas**, 223 U.S. 288, 298 (1912); **Laurel Hill Cemetery v. City and County of San Francisco**, 216 U.S. 358, 365-366 (1910). **Jacobson v. Massachusetts**, 197 U.S. 11 (1905). Thus, the question to be resolved in

this case is not whether the Ohio General Assembly was right or wrong in determing that the benefits of fluoridation outweigh the risks, if any, but rather whether the General Assembly had a reason for enacting Ohio Revised Code Section 6109.20 which is "at least debatable." In the section of this brief which follows the Respondents will establish that after over thirty (30) years of litigation concerning the benefits and risks of public water supply fluoridation, it was lawful for the Sixth Circuit to take judicial notice of the information which is available indicating that fluoridation provides many public health benefits and little, if any, risk to the public, thereby establishing that the wisdom of Chapter 6109 is clearly "at least debatable."

2. During the thirty (30) years over which the validity of fluoridation laws has been litigated, evidence has been produced, as to which the court may take judicial notice, establishing that the wisdom of public water supply fluoridation is at least debatable.

This Court has repeatedly held that it is proper to take judicial notice of legislative facts which establish that the wisdom of legislation is "at least debatable." **Minnesota v. Clover Leaf Creamery Co.** *supra* at 464; **United States v. Carolene Products Co.**, *supra* at 154. The legality of fluoridation statutes has been repeatedly litigated for over thirty (30) years and therefore the basis for the enactment of fluoridation statues is within the province of judicial notice.

Indeed, the constitutionality of Section 6109.20 of the Ohio Revised Code has, in effect previously been affirmed in **Alkire v. Cashman**, 350 F. Supp. 360

(S.D. Ohio, 1972), *aff'd*, 477 F.2d 598 (C.A.6, 1973) *cert. denied*, 414 U.S. 858 (1973). In **Alkire**, *supra*, the district court, in affirming the constitutionality of Section 6111.13 of the Ohio Revised Code declared, that:

> Courts, both state and federal, have held with virtual unanimty that the fluoridation of public water systems does not violate the due process clause or constitutional rights incorporated by that clause of the Fourteenth Amendment to the United States Constitution. *Id.*, at 362.

Section 6109.20 is virtually identical to Section 6111.13 and is merely a recodification of the former provision resulting from the Ohio General Assembly's decision to create a chapter of the Revised Code dealing with drinking water quality separately from Chapter 6111 which deals with water pollution. As a result the language of former Section 6111.13 was transferred to the new Chapter 6109 as Section 6109.20. Thus the Sixth Circuit's decision in **Alkire**, *supra*, is fully applicable to, and dispositive of, the Complaining Citizens' challege to the State's actions taken pursuant to Section 6109.20 of the Ohio Revised Code. In addition, in **Crawford v. City of Detroit**, 389 F.2d 1001 (C.A.6, 1968), the Sixth Circuit also rejected a claim that fluoridation of a public water supply was unconstitutional.

Furthermore, this Court has repeatedly indicated that the constitutionality of fluoridation of public water supplies is no longer open to controversy. On five separate occasions state supreme courts have upheld the constitutionality of fluoridation and an appeal was then filed in this Court. In every case this Court has dismissed the appeal for want of a substantial federal question. **Minnesota State Board of Health v. City of Brainard**,

241 N.W.2d 624 (1976), *appeal dismissed,* 429 U.S. 803 (1976); **Canton v. Whitman,** 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975), *appeal dismissed,* 425 U.S. 956 (1976); **Chapman v. City of Shreveport,** 225 La. 859, 74 So.2d 142 (1954), *appeal dismissed,* 348 U.S. 892 (1954); **Kraus v. City of Cleveland,** 163 Ohio St. 559, 122 N.E.2d 609 (1955), *appeal dismissed,* 351 U.S. 935 (1956); **Birnel v. Town of Fircrest,** 53 Wash.2d 830, 335 P.2d 819 (1959); *appeal dismissed,* 361 U.S. 10 (1959). In addition, the Court has four times denied certiorari on decisions of state courts upholding the constitutionality of fluoridation. **Paduano v. City of New York,** 45 Misc.2d 718, 257 N.Y.S.2d 531, *affirmed,* 24 App. Div.2d 437, 260 N.Y.S.2d 831 (1965), *affirmed,* 17 N.Y.2d 875, 271 N.Y.S.2d 305, 218 N.E.2d 339 (1966), *cert. denied,* 385 U.S. 1026 (1967); **Schuringa v. City of Chicago,** 30 Ill.2d 504, 198 N.E.2d 326 (1964); *cert. denied,* 379 U.S. 964 (1965); **DeAryan v. Butler,** 119 Cal. App. 2d 674, 260 P.2d 98 (1953), *cert. denied,* 347 U.S. 1012 (1954); **Dowell v. City of Tulsa,** 273 P.2d 859, 43 A.L.R.2d 445 (Okla. 1954); *cert. denied,* 348 U.S. 912 (1955). Furthermore, the constitutionality of fluoridation has been repeatedly upheld in virtually every state of the union. See for example, **Wilson v. City of Council Bluffs,** 253 Iowa 162, 110 N.W.2d 569 (1961); **Readey v. St. Louis County Water Co.,** 352 S.W.2d 622 (1961), *appeal dismissed,* 371 U.S. 8 (1962); **Teeter v. Municipal City of LaPorte,** 236 Ind. 146, 139 N.E.2d 158 (1956); **Baer v. City of Beard,** 206 Or. 221, 292 P.2d 134 (1956); **Froncek v. City of Milwaukee,** 269 Wisc. 276, 69 N.W.2d 242 (1955). In essence, the fluoridation debate has been going on for over thirty (30) years. Constitutional challenges have been rejected by virtually every court in the country. Nine times this Court has had a chance to pass upon the question, but has declined to do so each time. In five of those instances, the Court specifically indicated that the

appeals were dismissed because the fluridation issue does not present a substantial federal question.

As a result of all this litigation, dental caries, or tooth decay, has been recognized in numerous judical decisions as a serious public health problem. See for example, **Minnesota State Board of Health,** *supra,* at 632; **Chapman v. Shreveport,** *supra,* 74 S.2d at 146; **Readey,** *supra,* 352 S.W.2d at 626. Furthermore,

> The relation of dental hygiene to the health of the body generally is now so well recognized as to warrant judicial notice. **Dowell,** *supra,* 43 A.L.R.2d at 451.

Thus the prevention and treatment of dental caries have been widely accepted as a basis for the exercise of a state's police power to protect public health. Furthermore, the effectiveness of fluoride treatment in reducing the incidence of dental caries is "beyond any serious question". **Minnesota State Board of Health,** *supra,* at 629. The reduction is as high as 50-65 percent. **Chapman,** *supra,* 74 S.E.2d at 144; **Readey,** *supra,* at 626. As a result, fluoridation treatment has been endorsed by a plethora of public health organizations.

In many of these previous decisions upholding the constitutionality of fluoridation the courts have expressly acknowledged that there is a conflict of opinion in the scientific community concerning the risks and benefits of fluoridation. **DeAryan,** *supra,* 260 P.2d at 99-100; **Minnesota State Board of Health,** *supra* at 629; **Readey,** *supra,* 352 S.W.2d at 627. Indeed, in **Readey,** *supra,* at 626, the court noted many of the same claims of adverse health effects as are made by the Complaining Citizens in the case at bar. See also **Graybowl v. McNevin,** 439 S.W.2d 323, 330-331 (Kent. 1969); **Attaya v. Town of**

Gonzalez, 192 So.2d 188, 193 (La. App. 1966); **Hall v. Bates**, 247 S.C. 511, 148 S.E.2d 345, 346 (1966); **Schuringa**, *supra*, at 330-331; **DeAryan**, *supra*, 260 P.2d at 100-101. In each case the courts have recognized that despite the alleged adverse health effects the fluoridation program did have a constitutionally permissible basis as a public health measure because of the wide belief in its beneficial effects to control dental caries and therefore the role of judicial review was completed. The wisdom of fluoridation in light of its benefits and risks was left to the legislative and executive branches. This is now a settled issue of law and no longer presents a substantial federal question.

The Sixth Circuit, in its decision below, and based upon this extensive history of anti-fluoridation litigation, stated:

> Appellants seek to present scientific evidence to support their claims that fluoridation creates a serious risk of harm. Scientific evidence, however, also exists which supports the view that fluoridation does not create a serious risk of harm to the public. The fluoridation issue has been presented to the Ohio legislature and Ohio Revised Code Section 6109 et seq. is the result of the exercise of its legislative judgment. We agree with the district court that the resolution of the fluoridation issue must be left to the legislative process.

In effect, the Sixth Circuit recognized that after thirty (30) years of litigation the debatable nature of the fluoridation issue was clear and the scope of its review was therefore satisfied. Then, based upon the repeated

holdings of this Court, it refused to determine whether the Ohio General Assembly's decision was right or wrong, recognizing that such a question was one for legislative, not judicial determination. This approach is clearly correct. In their brief in support of their petition for certiorari, however, the Complaining Citizens severely misconstrue the holding below as being inconsistent with prior decisions of this Court. The Respondents will now address those claims.

3. The Complaining Citizens' Petition For Certiorari Is Based Upon A Serious Mis-Interpretation Of The Opinion Below And Prior Decisions Of This Court.

The Petitioners Complaining Citizens make two arguments to this Court: (1) the Sixth Circuit's decision below that their claims involved a non-justiciable political controversy is contrary to this Court's decision in **Jacobson v. Massachusetts,** *supra;* and (2) the court of appeals refused to accept the allegations of their complaints as true in violation of this Court's holding in **Jenkins v. McKeithen,** 395 U.S. 411, 421-422 (1969). The fallacy of each argument will now be explored.

The error in the Complaining Citizens' attempt to compare the Sixth Circuit's holding of non-justiciability in the case at bar with this Court's treatment of the dispute in **Jacobson,** *supra,* as a justiciable controversy lies in the Citizens' failure to appreciate the limited scope of review in the cases. **Jacobson** involved an appeal from a conviction for refusal to be vaccinated as required by a Massachusetts statute. The appellant challenged the statutory requirement for the vaccination. He proferred that his refusal to be vaccinated was justified because there was scientific evidence which indicated that the vaccination could be harmful to his health. The Court rejected this argument and declared:

> The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contact it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. . . .The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. *Id.* at 34-35 (Emphasis supplied).

The Court thus rejected the notion that the judiciary, rather than the state legislature, could determine the policy question as to whether the benefits of vaccination programs outweigh the risks. Indeed, this Court limited its scope of review to determining whether there was a debatable basis for the vaccination program, and after using judicial notice to establish that there was such a basis, rejected the appellant's argument. *Id.* at 30-31. The Sixth Circuit followed the same approach in the case at bar. It treated the case as justiciable for the

limited purpose of determining that since there is evidence on both sides of the fluoriuation question, there is at least debatable grounds to support the Ohio General Assembly's legislative judgment. As to the Complaining Citizens' invitation to resolve the conflict and conclude that the Ohio General Assembly's policy judgment was erroneous, however, the Sixth Circuit properly treated that question as a non-justiciable matter. This is entirely consistent with the Court's repeated holding that:

> [L]itigants may not procure invalidation of legislation merely by tendering evidence in court that the legislature was mistaken. **Minnesota v. Clover Leaf Creamery Co.**, *supra* at 464.

In essence, the decision below correctly treated the question of the wisdom of the fluoridation statute as a non-justiciable matter.

The Complaining Citizens' second argument, that the lower Courts failed to accept the truth of the allegations in their complaints as required by **Jenkins v. McKeithen**, *supra*, similarly misinterpretes the lower courts' holdings. Both lower courts recognized simply that it was not within the judicial function to determine whether their claims of injury were true, but rather the court was limited solely to determining that the basis for Revised Code Section 6109.20 was "at least debatable". Once the debatable nature of the proposition was established, the courts' limited role was completed. Therefore the courts properly concluded it was not their funciton to determine whether the Citizens' claims of injury are or are not true.

CONCLUSION

The claims of the Petitioner Citizens involve an attempt to impose upon others their theories of good health by means of judicial fiat. The crux of their case is that they wish for the judiciary to resolve the policy judgment involving the benefits and risks of fluoridation and determine that the Ohio General Assembly was wrong in adopting Section 6109.20 of the Revised Code. As the numerous decisions of this Court have held, it is not the function of the judiciary to evaluate the wisdom of legislation. The courts determine merely if there are debatable grounds for the statute. In this case the district court properly determined that there no longer remains a substantial constitutional question concerning the debatable nature of fluoridation statutes. The court of appeals correctly concluded that an attempt to litigate the wisdom of the legislation beyond its debatable nature involves a non-justiciable matter which must be addressed in the political arena of the legislative branch of government. As this Court held in **Vance v. Bradley**, *supra*, at 97:

> [J]udicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Therefore, the Complaining Citizens' petition for certiorari should be denied.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

EDWARD D. HAYMAN
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

CERTIFICATE OF SERVICE

I hereby certify that three copies of Brief in Opposition to Petition for Writ of Certiorari have been forwarded to each of the following; Larry L. Inscroe, Inscore, Rinehardt and Whitney, 3 North Main Street, Mansfield, Ohio 44902, Counsel for Petitioners and to James DeWeese, Inscore, Rinehardt and Whitney, 3 North Main Street, Mansfield, Ohio 44902, Counsel for Petitioners, via the U.S. Mail, this 6th day of October, 1982.

E. DENNIS MUCHNICKI
Assistant Attorney General